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# **NAVAL POSTGRADUATE SCHOOL**

## **Monterey, California**



## **THESIS**

**THE ROLE OF INTERNATIONAL JURIDICAL PROCESS  
IN INTERNATIONAL SECURITY AND CIVIL-MILITARY  
RELATIONS**

by

Stavros Polydorou

December 2002

Thesis Advisor:  
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James H. Armstead  
Thomas Bruneau

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**THE ROLE OF INTERNATIONAL JURIDICAL INSTITUTIONS IN  
INTERNATIONAL SECURITY AND CIVIL-MILITARY RELATIONS**

Stavros Polydorou  
Lieutenant, Hellenic Navy  
B.S., Hellenic Naval Academy, 1992

Submitted in partial fulfillment of the  
requirements for the degree of

**MASTER OF ARTS IN**  
**INTERNATIONAL SECURITY AND CIVIL-MILITARY RELATIONS**  
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## ABSTRACT

This thesis answers the following question: “Does the practice and theory of modern Transnational Juridical Institutions impact upon the development and maintenance of International Security within the complex of the Civil Military relation’s paradigm, and if so, how?” Therefore it examines the effects of International Juridical Institutions upon the relations between civil authorities and the military structure within modern states. Since 1945 the international community has constituted four *ad hoc* tribunals, namely the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for Yugoslavia, and the International Criminal Tribunal for Rwanda. Their mandate was to bring to justice those who have committed grave breaches of international law by the waging of aggressive war, crimes against humanity, war crimes, genocide, and crimes against peace; crimes committed with the use of the military. Their jurisprudence significantly challenged the relations between the military the state and the society not only in the state they had or have jurisdiction but worldwide. They have affected constitutions, attitudes, education, training, roles and missions of the military and posed limitations to the state by influencing domestic or international social and legal order. These changes within the civil-military relations and international security promoted by these international criminal courts highlights that international justice could be used as a useful political instrument. Hence, they were a success. However, the current political debate under the new permanent International Criminal Court reveals that systemic international justice has not matured yet to meet the needs of a world equipped with a plethora of weapons and highly sophisticated weapons of destruction that could allow for horrific crimes.



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*To my parents I owe my being, to my teachers I owe my well being.*

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## EXECUTIVE SUMMARY

This thesis examines the practice and theory of the four *ad hoc* criminal tribunals, namely the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East at Tokyo, the International Criminal Tribunal for Yugoslavia at The Hague, and the International Criminal Tribunal for Rwanda at Arusha. This was done through the prism of civil-military relations and their dynamics.

The abovementioned tribunals have shown that international unwillingness to accept serious violations of international crimes is no longer a theoretical concept, and that is what is expected from them: to send the signal that impunity is no longer tolerable. In doing so, they significantly challenged the relations between the military, the state, and the society not just in the state that had or have jurisdiction but worldwide.

The International Military Tribunals produced principles that were codified as international law and influenced societies by serving as symbols; states and state behavior through their constitution, legislation, and appealing to the public; armed forces through education, changing traditions, training in new missions, and forging a cult of obedience in international law. Although Germany and Japan had been for many years under occupation, credit has to be given to the IMTs for the establishment of democratic civil-military relations in them. Furthermore, even though the IMTs had taken place more than fifty years ago they still influence policies and affect the armed forces in terms of training, education, designing missions and being deployed. New missions in terms of stability operations require knowledge of terms like “aggression,” “proportional force,” “war crimes,” “genocide,” and “crimes against humanity,” a terminology that was first established in those criminal tribunals after the Second World War.

Moreover, a new doctrine in the post Cold War era has been introduced, that includes among others respect for human rights. In countries such as the former Yugoslavia and Rwanda during the last decade even human dignity has been trampled on a large scale. By punishing those responsible for the horrific crimes in those states a powerful message to the political, military authorities, and warlords is delivered

worldwide: one day sooner or later they will be brought to justice. This is exactly what the ICTY and the ICTR are trying to do.

Their mandate is not to develop international law; those standards already exist. By continuing the momentum of the IMTs, they have caused significant legal developments; even diffusion effects in national legislations and in the United Nations as the cases of Pinocet and the internationalized tribunals are showing. However, their mandate should be considered also in a narrower terms, i.e. in being a part of the tool kit for building confidence and reconciliation in their post-conflict societies and prevent destabilization of their regions. Both tribunals showed as long as they are supported in their efforts they are successful in fulfilling their mandate. Likewise, the ad hoc tribunals' contribution within the civil-military relations should be examined under that prism. So far even being supported by the West changes started emerging only recently, and is the future that prove them real or just cosmetic; a hypocrisy by the elites holding office to provide themselves with aid, to eliminate their rivals, and to consolidated power.

The time and effort required to establish, make them functional, and to provide the necessary logistics for the above tribunals brought the Security Council to a point of "tribunal fatigue" that led to the establishment of the ICC. The debate over the latter, and the United States refusal to ratify it, has resulted in two major outcomes. The first is that efforts for prosecuting war criminals and promoting international justice lost their major contributor both in personnel and logistics, the United States of America and, second that the possible U.S. military withdrawal from current peacekeeping operations like the ones in East Timor and Bosnia, would affect roles and missions of the U.S. military, by limiting their participation in U.N. peacekeeping.

The abovementioned research highlighted that international justice can be used as a useful policy instrument to promote democratic civil-military relations. It effects Constitutions, attitudes, education, training, roles and missions of the armed forces and poses limitations to the state and the military through the established legal order in terms of monitoring or balancing mechanisms like the military or the criminal justice system.

# **I. INTRODUCTION**

## **A. BACKGROUND**

Historically, the areas of common international concern, on the global or international level, were the guides for enforcing international law. It was the interests of the Western powers, after the experiences they had had with totalitarian regimes in the World Wars, that prompted them to set up international machinery to ensure among others the protection of certain values, and to prescribe rules of conduct for the armed forces, the use of these forces by the states and the relation of both state and military authorities with the society. This machinery includes widely different bodies with rather few commonalities; from third party adjudicative mechanisms and dispute settlements regimes, to criminal tribunals.

In that effort not all attempts were successful. Five Central American nations on December 20, 1907 tried to establish a regional and transnational court. This Central American Court of Justice failed mainly due to the lack of independence of judges, overly broad jurisdiction, and the absence of satisfactory procedure.<sup>1</sup>

It was the First World War that marked a new phase in the historical development of international juridical bodies, and in the criminal responsibility for war crimes due to the flagrancy and cruelty of the laws of war violations. After the end of the First World War, under the pressure of the public opinion in the victors' countries and during the Versailles peace negotiations, 901 accused war criminals were to be indicted.<sup>2</sup> These criminals were both civilian and military authorities thus international law was brought into the dynamic of the relations between the state, the military, and the society, or the civil-military relations framework.

Nevertheless, the attempts to bring German military officers to justice proved ineffective. The different positions taken by each of the Allied Powers allowed the

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<sup>1</sup> World courts, *The Central American Court of Justice-Introduction*.

Available [online] at: <http://www.worldcourts.com/cacj/eng/intro.htm>, 10/10/2002.

<sup>2</sup> J.Holmes Armstead Jr, *The International Criminal Court: History, Development and Status*, Santa Clara Law Review, Vol. 38, No 3, 1998, p. 746.



Germans to achieve a compromise, so that accused German war criminals could be tried from the German Supreme Court in Leipzig. The trials began in May 1921, and lasted until June 1922 in an atmosphere of “patriotic indignation”<sup>3</sup> resulted in only thirteen convictions.<sup>4</sup>

During the interwar period there was an effort to restrict the freedom of states in their choice of means of warfare, and in outlawing war as an act. In such an attempt in 1919 the Permanent Court of International Justice (1922-1946) or PCIJ, was established. Likewise in 1926, a permanent International Criminal Court was proposed, during the thirty-fourth Conference of the International Law Association held in Vienna. However, the idea of suppressing acts committed either by states or individuals endangering peace was still regarded as a manifestation of a dangerous revolutionary sentiment. As a result, the attempts by the victors of the First World War did not result in the control of the military in the defeated countries or in increased international security. Empirical evidence of similar attempts after the end of the Second World War however, appear to be totally different, with the establishment of the International Court of Justice (ICJ) and-mainly-with the International Military Tribunals (IMT) in Nuremberg and Tokyo.

The ICJ or World Court, which sits at The Hague, in The Netherlands was created in 1945 to decide, in accordance with international law, on disputes submitted to it by states. A case can only be submitted to the ICJ with the consent of the states concerned. It is this agreement that determines the jurisdiction of the court.<sup>5</sup> Furthermore, on August 8, 1945 the allied powers acting in the interests of all the United Nations (U.N.) members set up the first International Military Tribunal (IMT) at Nuremberg for the war criminals of the European Axis that resulted to real punishments and significant jurisprudence. Along with the next IMT at Tokyo were the turning point in the history of international

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<sup>3</sup> M. Cherif Bassiouni, Vet Nanda et al, *A treatise in International Criminal Law*, Vol. 1, Thomas, 1973, p.568.

<sup>4</sup> J.Holmes Armstead Jr., *The International Criminal Court: History, Development and Status*, p. 746.

<sup>5</sup> ICJ has jurisdiction over a dispute only if either the parties bilaterally agree to submit an already existing dispute to it, if treaties or conventions in force confer jurisdiction to it, or if the state has declared the acceptance of the ICJ's compulsory jurisdiction. Between 1946 and July 1, 1996, the court was called upon to deal with 74 cases in which it delivered 61 judgments, made 295 orders, dealt with 22 advisory cases, delivered 23 advisory opinions, and made 32 orders. See *Case Summaries*, United Nations. Available [online] at:

[www.icj-cij.org/icjwww/igeneralinformation/ibbbbook/Bbookchapter8index.htm](http://www.icj-cij.org/icjwww/igeneralinformation/ibbbbook/Bbookchapter8index.htm), 1/15/2002.

criminal law, which however influenced the rest of the post Second World War national military tribunals and trials and still influence national and international actors today.

These successful attempts have significant political reasoning behind them; the perceived evil of Nazism was far deeper and more pervasive than that of Imperial Germany in the First World War. The crimes of the German and the Japanese authorities during the Second World War had reached dimensions unparalleled in human history. The pressure from world opinion and the need not to condemn the entire Axis population as the Cold War was imminent and both East and West needed support to consolidate their respective positions caused official attitudes to change. Hence, the international community focused on enforcing more effective sanctions, a policy that found support from the interwar development of the laws of war. Therefore, for the first time those responsible for waging a war of aggression or responsible for atrocities or other crimes under international law, were subjected to real penalties. The previous tactic used in the First World War to have individuals prosecuted and punished by their own countries tribunals was now abandoned as futile. In that spirit, the first IMT, the Nuremberg Tribunal lasted eleven months, and out of the twenty-one defendants in custody (one indicted Nazi, Martin Bormann, was indicted in absentia, though never found), a total of eleven were sentenced to death, three were acquitted and the rest received extended prison terms. Likewise, the second IMT, the International Tribunal for the Far East (IMFTE) was set by the Allied Supreme Commander in the Far East, General Douglas MacArthur, on January 19, 1946. The trials began on May 3, 1946, and lasted two and a half years. On November 4, 1948 the tribunal's president Sir William Webb from Australia announced that all of the defendants had been found guilty. Seven were sentenced to death, sixteen to life terms, two to lesser terms, two had died during the trials, and one had been found insane.

Although the above trials have been criticized as “victor’s justice” it was the first time that international criminal law had been rigorously and effectively enforced. The coerciveness of the tribunals, the new focus on the principle of individual responsibility among the military and the government officials through a trial process has set a precedent. Through focusing on individuals from the military and the government the stigma of collective guilt was lessened to the German and Japanese people, and bolstered

the institutionalization of their countries towards democratic regimes. Constitutions were created with provisions for the democratic control of the military, and the citizenry did not have the notion of humiliation as much as after the end of the First World War. Furthermore, they created an evolution of political, military and legal accountability. With the effective enforcement of international law a powerful message has been sent to the individuals in power that they cannot commit genocides and crimes against humanity with a sense of impunity. Indeed, the democratic control of the military both in Germany and in Japan is not questioned today, and much credit has to be given to those tribunals.

The ideas and principles set by the IMTs have developed gradually. The principal impetus has been the United Nations and in particular the United Nations General Assembly, first in the Charter itself, further in the Universal Declaration of Human Rights in 1948, then in the 1948 Genocide Convention, and afterwards in a series of treaties adopted over the past several decades. Likewise, the legal institution building continued with the establishment, among others, of the United Nations Administrative Tribunal on November 24, 1949 by General Assembly Resolution 351A (IV) in an attempt to pass judgments upon applications alleging non-observance of contracts of employment of staff members or of their terms of appointment, and the International Tribunal for the Law of the Sea (ITLOS) located in Hamburg, Germany, by the United Nations Convention on the Law of the Sea of December 10, 1982, which entered into force on November 16, 1994. ITLOS works as “one of the means for the settlements of disputes concerning the interpretation of the Convention.”<sup>6</sup> The Europeans had moved in a similar direction with the establishment of the European Court of Justice (ECJ) in 1952 as the judicial institution of the Community, and the European Court of Human Rights (ECHR) in 1959 which evolved in 1998 in a new ECHR as the means for enforcing the obligations arising from the European Convention of Human Rights and its Protocols, for the contracting states. Although these courts are transnational and more regional than international, they influence not only the members of the European Union (E.U.) but are respected worldwide. Furthermore, their role is vital, constructive, and innovative for the

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<sup>6</sup> *International Law*, United Nations.

Available [online] at: [www.un.org/Depts/dhl/resguide/specil.htm](http://www.un.org/Depts/dhl/resguide/specil.htm), 1/13/2002.

states that applied or are going to apply for membership in the E.U. and set a new standard of acceptance for regional transnational juridical bodies.

However, during the Cold War the bipolar split in world politics and its aggravation of tensions between the developed and developing worlds hobbled international institutions. International law developed quickly but its international monitoring and enforcing mechanisms remained highly politicized or quasi-judicial in the best of the cases. Human values and international law were seen as the ideological bent of the West. Under that perspective, the ECHR and the Inter-American Court of Human Rights (IACHR) had strong monitoring powers but limited enforcement capabilities.

After the end of the Cold War the United Nations provided an answer to the demand for peace and security. The Security Council now personified the central norms and values of the international community and became the major instrument for promoting and establishing stability. The states now were not conceived as a source of protection but also as a source of harm causing instability and security crises. The post-communist countries received major international influence in achieving their transition to democracy and establishing democratic civil-military relations. Democracy was accepted now as the cornerstone of international stability. Moreover, places that would have been considered of relatively little significance in the previous Cold War setting have now become important, e.g. the case of Somalia. Therefore, the Security Council has set up *ad hoc* tribunals in order to solve immediate problems in cases where the civil society was too weak to bring to justice the accused individuals.

Hence, the horrific events in Rwanda and in the former Yugoslavia led the United Nations (U.N.) to establish *ad hoc* tribunals to prosecute persons responsible for genocide and violations of international humanitarian law. On May 25, 1993, Security Council Resolution 827 announced the creation of an international tribunal, located in The Hague (Netherlands), to prosecute those who had violated international humanitarian law in the former Yugoslavia, and on November 8, 1994 the U.N. set another tribunal located in Arusha (United Republic of Tanzania) to prosecute the persons responsible for genocide and other serious violations of international humanitarian law in Rwanda and its

neighboring states between January 1 and December 31, 1994.<sup>7</sup> The International Criminal Tribunal for Former Yugoslavia (ICTY) has eighty indictees, forty-nine of them are currently in proceedings before the tribunal, and thirty-one remain at large.<sup>8</sup> The International Tribunal for Rwanda (ICTR) issued its first indictment against eight accused persons in November 8, 1995, and since then over seventy suspects have been indicted, of whom more than fifty have been taken into custody. Of those so far apprehended, the trials of nine have been completed which resulted in eight convictions and one acquittal. Seven trials, and two appeals are currently in progress. As a result, “the total of completed cases and trials in progress involve over half of the total persons arrested.”<sup>9</sup>

These tribunals, through their jurisprudence, have shown that international criminal justice is a reality, and that the establishment of an internationally recognized system of justice provides a new avenue of recourse in the rule of law as an alternative to the use of force by individuals or states. Furthermore, the success of such institutions by influencing other social and political institutions and appealing to the hearts and minds of the people, encourages the domestic courts and other extra-judicial mechanisms to take up their work at a national level, and promotes national reconciliation, as well as regional and international security.<sup>10</sup> The international tribunals’ jurisprudence developed into standards of acceptable behavior. Moreover, the legitimization of the tribunals to the local societies (since they represent a worldwide effort), along with the help of the international community enforcing practical demands (by means of sanctions and financial assistance), seem to be creating relative forms of stability and obedience. This implies obedience of the military to the elected civilian authorities and compliance of the latter to the Constitution. These legal and constitutional compliances are central elements in the dynamics of the civil-military relations since they influence military and political

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<sup>7</sup>*United Nations Documentation: Research Guide*, United Nations.

Available[online]at: [www.un.org/Depts/dhl/resguide/specil.htm](http://www.un.org/Depts/dhl/resguide/specil.htm), 1/13/2002.

<sup>8</sup> *ICTY, ICTY at a glance*, United Nations. Available [online] at: [www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm), 1/14/2002.

<sup>9</sup> *Achievements of the ICTR*, United Nations. Available [online] at: [www.icttr.org](http://www.icttr.org), 1/14/2002.

<sup>10</sup> Such national behavior from the national courts can be observed in notorious human rights abuse cases like *Pinocet* in the United Kingdom and *Hissene Habre* in Senegal.

behavior and impose limitations and restrictions from servicemen conduct to armament and funding policies.

However, the “ethnic cleansing” in the former Yugoslavia had another effect besides the ad hoc tribunal: it speeded the structural development of a permanent court. Although scholars have argued for the need of an international criminal court since the 1920s, and the U.N. recognized the need for such a court with Resolution 260 on December 9, 1948. Since then, the question of the establishment of an international criminal court has been considered periodically until 1998 when the international community met in Rome, Italy, from June 15 to July, 17 to finalize a draft statute which, when ratified, would establish such a court. Although the International Criminal Court (ICC) has been called the missing link in the international legal system, its creation is very closely bound with issues of state sovereignty. Indeed, the creation of the ICC even for prosecution of particularly grave international crimes finds it difficult to overcome the traditional notion of state. Moreover, states are still unlikely to allow international bodies or courts vigorously enforcing international law on their own without their consensus, regarding themselves as the source of law and order within their own boundaries. Until November 1, 2002 out of one hundred and thirty nine signatories at the Rome’s Statute of the ICC eighty-one are currently parties out of the sixty needed, and the ICC came in force on July 1, 2002.<sup>11</sup> Nevertheless, the U.S. has refused so far to accept the ICC’s jurisdiction over American citizens thus reinforcing the traditional notion of state.<sup>12</sup>

## **B. PURPOSE AND MAJOR ARGUMENT**

“Who is concerned now with the extermination of Armenians?”

Adolf Hitler, addressing his military commanders on August 22, 1939.<sup>13</sup>

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<sup>11</sup>*Rome Statute of the International Criminal Court*, United Nations.

Available[online]at:

[www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp](http://www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp), 1/15/2002.

<sup>12</sup> Americans will be tried by U.S. courts if accused of abuses. See Ian Black, *EU Caves In To Washington Over International Criminal Court*, the Guardian/UK, 9/30/2002. Available [online] at: <http://www.commondreams.org/headlines02/0930-01.htm>, 11/1/2002.

<sup>13</sup> Nuremberg, Trial Documents, Doc. L-3.

Within the framework of modern civil-military relations the civilian control of the armed forces is paramount. The basis of the civilian control is the lawful authority under the Constitution of the state, which in the modern liberal democracies accepts international law. Therefore, the armed forces are bound to obey international law. This came as a necessary means of compliance since most of the times the armed forces were used by their states to commit horrific crimes with the most inhumane methods, eliminating even their own citizens, the ones that they were supposed to protect. Hence, law-and international law in particular-serves as a tool to restrict the military in lawful actions and to provide means of accountability for the statesmen when they use their military in unlawful actions.

Unfortunately, until today an international legal norm that is meant to be applied to all states, and especially the world powers, is a contradiction in terms because it presupposes the consensus for a breach in state sovereignty and a superior transnational authority that do not exist. Further problems arise when international law is enforced by international bodies, e.g., Transnational Juridical Bodies, without the consent of involved states, where matters concern their citizens-military or civilian-that are ordered by their lawfully constituted authorities to commit breaches of international law.

Such international criminal bodies had been the four *ad hoc* tribunals of the twentieth century and the new ICC. Because no case is brought to the ICC so far the four *ad hoc* criminal tribunals are the ones that give the international community's tone to the efforts of eliminating impunity and for that this thesis will concentrate heavily on them.

Hence, this thesis answers the following question: "Does the practice and theory of modern Transnational Juridical Institutions impact upon the development and maintenance of International Security within the complex of the Civil Military relation's dynamics, and if so, how?"

The major argument is that if justice is served through institutionally mature, resourceful, widely representative, financially viable, and autonomous Transnational Juridical Institutions, then states and individuals will commit themselves further to the rule of law, even the most powerful states. Therefore, the executive authority of a nation-state will have even more reason to adequately express the will of the people, the armed

forces will be deterred from usurping the state apparatus, and the use of the military will be restricted to lawful actions. Thus, justice through international law applied by international bodies, will be used as a catalyst in transiting and consolidating democratic civil-military relations.

However, the wide variety of international bodies requires more than a master's thesis to address the question in full. Hence, this thesis could not possibly examine all the existing Transnational Juridical Institutions. This is beyond its scope. Instead, it has a modest aim. It will focus the research question on the *ad hoc* criminal tribunals, i.e. the two International Military Tribunals, and the two *ad hoc* tribunals within the United Nations system, i.e. the ICTY and the ICTR. As these are the most important institutions presently active I will endeavor to examine their effects upon the international system generally and the modern civil-military relations specifically.

Hence, if the answer to the research question is positive, these Transnational Juridical Institutions have served well as policy instruments, in terms that they have changed the *modus operandi* of the civilian authorities and their armed forces, and provided obedience of the latter to the former. Likewise, the coherent jurisprudence of these bodies may serve as a guiding light under the present conditions, within the United States and most of the Western military involved in a new war of an unprecedented nature, the war against terrorism, and the stability support operations in Afghanistan.

## C. METHODOLOGY

The methodology used in this thesis is a historical review of international law concepts and civil-military relations while focusing on the jurisprudence of the four *ad hoc* Transnational Juridical Bodies of the twentieth century, namely the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the International Criminal Tribunal for Yugoslavia, and the International Criminal Tribunal for Rwanda. I will examine the cases tried, interpret the judicial decisions and attempt to postulate the effects had upon the development of the civil-military relationship and concomitant state behavior.



Civil-military relations in this thesis are examined, in terms of the military, under the prism of how the military are used by their states, and how accountable they are, especially the officer corps. Likewise, in terms of the state, how accountable the statesmen are in giving unlawful orders, and what is the reaction within their societies. The understanding of the present thesis is not only that the military should be brought under civilian control, but also this control must be exercised from a democratic state apparatus where the rule of law is paramount.

Hence, the research attempts to identify variables within the framework of international security and civil-military relations (the answer to “how”) affected by the rulings and the jurisprudence of the tribunals (the presentation of “the practice and theory”), and by them to illustrate if civil-military relations are challenged and brought under democratic control by applying judicial methods. Such variables were constitutional and legal provisions, training, education, attitudes and traditions, roles and missions. All these were used in guiding the military in the normal democratic political process, i.e. eliminating impunity, establishing accountability, and limiting or refocusing roles and missions.

Major problems contributing to the difficulty of answering the research question have been the paucity of data available in English on the subject. There is very little, if anything at all, written on the topic, and in some cases it is considered to be a “non-issue” (which, on the other hand, makes it an issue). However, there is good material available on the history and policy dynamics of the *ad hoc* tribunals. Therefore, the effort was to link generally normative concepts applied from the courts with political analysis.

The latter however brought another major difficulty in consideration. The IMTs are long gone whereas the U.N. tribunals are still active; in fact they are entering now into a phase of maturity. Even more, lessons learned are not always relevant to all countries due to differences in history, security environment, and domestic structures. Germany and Japan were occupied for many years but are consolidated democracies now, whereas Yugoslavia and Rwanda are currently transiting to democracy but face security concerns. However, with the support of the international community, changes to

the latter are emerging; fragile or not these changes may be, they are indicators of influence of the external normative pressure through the international courts.

#### **D. SIGNIFICANCE OF STUDY**

Today some two hundred and ten international judges sit on more than twenty international judicial bodies and act as final arbiters on everything from the death penalty and responsibility for genocide, to the rights of gays in the armed forces. Nevertheless, there is very little awareness about these bodies and their achievements in civil-military relations and security issues. Hence, it is important to examine what such institutions have accomplished with their rulings thus far, and to evaluate future potential. Hence, from the numerous international courts and dispute settlement bodies, the abovementioned four international criminal courts, and their impact in civil-military relations in particular, has been the motive behind the present thesis.

Law was selected, because in general it is neglected in the civil-military literature, and international law even more. However, any research into law, and more particularly into the administration of justice, is a study of civilization. Between law and culture there is a close relationship. The legal system of any given society, international or domestic, can be considered as a reflection of its values. In every legal system, juridical institutions, domestic or international, mainly achieve promoting and enforcing the rule of law, including international law. The latter was born from the ashes of human beings exterminated in horrific ways by military and militia in an attempt for elites to seize or hold on power. Hence, it is very important to examine the relation between external structures such as the international criminal courts of the twentieth century and the transition to a civil-military *modus operandi*, which accepts civilian supremacy, in a democratic state that reflects the will of the majority but also protects the interests and the well being of the minority.

Civilian democratic control of the armed forces as already mentioned, is considered to be axiomatic in that democratic elected civilians are in control of the military. This kind of control serves as the solution to a simple paradox: The military, an institution of violence, is created to protect the polity from its external enemies, thus

relaxing our fears of others, but then we fear the same institution created for protection, unless it remains under legitimate control. The same paradox viewed from the military point of view is logically related to that: It is created to protect the polity but in overreaching its designated role it can destroy the same polity it is intended to serve.<sup>14</sup> The modern nation state is at its roots a legal entity: The democratic state must exercise legal control over all the states' institutions if in fact real democratic governance is to exist.

It is exactly this need for civilian democratic control that led civilian authorities to use law and legal institutions as part of the machinery for controlling the armed forces.<sup>15</sup> Because states regard themselves as the source of law and order within their boundaries, they are not willing to accept external systemic actors influencing domestic policies. However, today the continued existence of any government, particularly a democratic one, depends not only upon respect for the domestic law, but also relies upon respect by all other governments for at least several minimal provisions of international law, e.g., their boundaries, and their existence. Many international rules impose domestic limitations on the government's power, for the sake of their own legal order, i.e. their Constitution. Therefore the military being subject to the constitution of a state is intrinsically bound by international law. This does not imply that all legal techniques that are effective domestically would be equally successful when introduced within the international community with regards to the armed forces. It is nevertheless a useful tool, which has to be used. It should be best understood as a tool for international security, not as an alternative to force or to politics, but as a way of structuring political, and social order. It can serve the notion of balance of power both in the international and in the domestic arenas by bringing limitations upon the military, i.e., by changing doctrines, attitudes, and traditions.

Indeed, the establishment of formal international committees, procedures, and courts has as their primary purpose to hold governments and the state apparatus-including

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<sup>14</sup> Peter D. Feaver, *Civil-Military Relations*, Annual Reviews Political Science, 1999, 2:211-241.

<sup>15</sup> This does not imply that other methods have not been used. The need for civilian democratic control also required political and economic institutions and transformations along with educational changes. Law and legal institutions are just one part of the various tools in the state's machinery.

the armed forces, militia, and the police-accountable for their activities. They do so in a way that necessarily invades domestic sovereignty. In particular, the adoption of international tribunals and transnational juridical bodies in general is growing. During the Cold War both the bipolar split in world politics and its aggravation of tensions between the developed and developing worlds hobbled international institutions. Today, the end of the Cold War has loosened many of the blockades to international lawmaking and implementation. In that perspective, the recent adoption of the International Criminal Court on April 11, 2002 by the United Nations looks most promising; no country and no individual is out of its jurisdiction. Furthermore, the success of such an institution will further encourage the domestic courts and other extra judicial mechanisms at a national level, helping to provide regional and international security. Nevertheless, it is the future practice that will reveal the real potential of this new court as an achievement of mankind or as another failure due to international power politics.

#### **E. ORGANIZATION OF THE THESIS**

Chapter I is the introductory chapter of the present thesis. It briefly provides a background, the methodology followed, the purpose of this study, the significance of the thesis, and finally its organization.

Chapter II presents a conceptual approach of the term civil-military relations and a definition based on the trinity “state, military, and society,” and examines the role of law, and in particular international law, as a tool of political control within the civil-military relations framework.

Chapter III presents the relevant developments in international law, and shows its contemporary developments towards the gradual recognition that not only states but also individuals can be accountable under international law. It also briefly addresses the development of international criminal law, international humanitarian law, and international human rights law. When addressing the enforcement mechanisms, a definition in the terms of “Transnational Juridical Bodies” is proposed to include all the different international courts and dispute settlement bodies.

Chapter IV discusses the history, the jurisprudence and addresses the impact of the two post-Second World War *ad hoc* International Military Tribunals on international security and civil-military relations.

Chapter V discusses the history, the jurisprudence and addresses the impact of the two United Nations *ad hoc* International Criminal Tribunals on international security and civil-military relations.

Chapter VI covers the recent developments in the twenty first century with the permanent International Criminal Court being the major development. It further provides an overall assessment on applying judicial methods from international criminal bodies to challenge non-democratic structures, and develop democratic civil-military relations, and presents a conclusion.

## **II. CIVIL-MILITARY RELATIONS AND INTERNATIONAL LAW**

### **A. CIVIL-MILITARY RELATIONS**

Central to the discourse on state, society and military relations is that the modern state in large measure has drawn its power from its monopoly of the legitimate use of violence. Civil-military relations address the relationship of the military monopoly to the state and the society.

Within the modern Western democratic civil-military framework, the state is more than the government. It is the continuous administrative, legal, bureaucratic, and coercive systems that attempt not only to manage the state apparatus, but to structure relations between civil and public power and relationships both with and within the society. Likewise, society is the arena where manifold interest groups and social movements (such as neighborhood associations, women's groups, religious groups, intellectual currents, civil organizations and NGOs) from all classes (such as trade unions, journalists, lawyers, and entrepreneurs) attempt to assemble to express their ideas and advance their interests. It also includes the environment where the polity (polity in the classic Aristotelian concern, with how people organize themselves for collective life in the polis) specifically arranges itself for political concentration to gain control over public power and the state apparatus.<sup>16</sup>

On the other side of the spectrum, the military holds a legal monopoly of armed force. It also includes a multiplicity of organizations and services consisting mainly of the forces assigned to national defense, namely: the army, the navy, and the air force. It is vital in terms of adopting and implementing the state's national security policy; in how to enhance the state's social, political, and economic institutions against threats from other states. However, the military is shaped both by the different security threats and by the social forces, values, ideologies, and institutions dominant within the society.

It is important to note that within civil-military relations literature the focus is predominately on the officer corps. This is due to the rigid hierarchical structure of the

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<sup>16</sup> Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone*, Princeton University Press, 1988, p. 3-4.

armed forces. The most influential and important decisions are made and orders issued at the superior echelons. Hence, it is the officer corps that is primarily responsible for the military security of the society. Therefore, the political relations between the state and the officer corps reflect a balancing between civilians and the armed forces. This balancing is absolutely necessary for maximizing the state's security at the least sacrifice of other social values and needs.

Modern democratic regimes require civilian supremacy over the armed forces. If democratic conditions apply to any state bureaucracy, the military is clearly the one in which these conditions take on crucial importance due to the recognized monopoly over society's coercive power. In a democracy, citizens formulate and articulate their preferences, and have those preferences represented in the conduct of government. This dynamic is provided with corresponding institutional and legal guarantees. Hence, modern civil-military relations explicitly include the military as subject to the policies formulated by elected individuals holding the highest state offices. Civilian supremacy is regarded as *sine qua non*. The assertion of this civilian supremacy restricts the armed forces only to assistance in the formulation and implementation of national defense policy as the legitimate government adopts it.

Although Plato addressed the political control of armed forces about 2,500 years ago in *The Republic*, the conception of civilian supremacy as the cornerstone of civil-military relations only emerged modernly in the 1950s. Samuel Huntington succinctly describes the important connection between the civil government and the military establishment within the confines of the modern nation state. Indeed, he addressed the problem of minimizing military power with two methods of civilian control namely, the methods of subjective and objective civilian control. Subjective civilian control presupposes some degree of military involvement "in institutional class, and constitutional politics." The military become "the mirror of the state" and they do not possess an independent military sphere. In fact "...the essence of subjective civilian control is the denial of an independent military sphere."<sup>17</sup> However, according to Huntington, the rise of the military profession made this method obsolete, and gave rise

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<sup>17</sup> Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations*, The Belknap Press of Harvard University Press, 14<sup>th</sup> printing, 2000, p.83.

to objective civilian control. Objective civilian control achieves its end by “militarizing the military, making them the tool of the state,”<sup>18</sup> and used as such by the civilian authorities. This method of control is based on the maximization of professionalism, which has the consequence of rendering the armed forces “political sterile and neutral.”<sup>19</sup> Nevertheless, this minimization of the military’s political power is balanced with “the recognition of autonomous military professionalism” and allowing an independent military sphere.<sup>20</sup>

Civilian supremacy gives democratically elected government unquestioned authority over all policy arenas. Civilian control is needed essentially to prevent the armed forces from challenging the state’s duly constituted political authority and prevailing values. It ensures that the military will not endanger the basic liberties, including the popular sovereignty that they are meant to protect. The essential guarantee, which is built (or has to be built) into the system, is the constitutional subordination of the armed forces to the legitimate government and to the national policy, as these are defined by the will of the people and their legislature. In such a system, the military role is generally constrained to matters of national defense and international security, it is removed from all responsibility for internal security, and a civilian ministry of defense, or an equivalent governmental structure, exists to enable civilians to exercise effective oversight and control of the armed forces. The military is an institution created by the state and is subordinate thereto; it serves as an instrument of policy, and is subordinated to the civil government in this role. Therefore, in a modern democracy, the degree of military participation can vary only within well-defined limits, which are in turn institutionalized with domestic legal manifestations. The validity and acceptance of a political and social order is reflected in these legal manifestations, along with measures of coercion, in a way that guarantee the provisions that they encompass.<sup>21</sup>

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<sup>18</sup> Ibid., p.83.

<sup>19</sup> Ibid., p.84.

<sup>20</sup> Ibid., p.83.

<sup>21</sup> A legal manifestation without encompassing provisions of coercion is considered to be *lex imperfecta* (imperfect law). A legal manifestation that reflects the political and social order in a democracy is usually the constitution. However, the guarantees provided by the constitution are adopted with usual legislation e.g., Military Codes of Justice, Military Penal Codes, etc..



In order to protect the state and the military from two types of potential dangers, certain constitutional formulas are adopted. These dangers are mainly twofold. First, military participation in politics, especially in making policy (including defense and security policy), and second the use or misuse of the military by politicians in order to attain political goals. Civilian control as a form of political control in many non-democratic regimes has involved the military in numerous atrocities and horrific crimes. As it is obvious in such cases, the country is either unable or simply unwilling to prosecute the criminals. Dictators and their puppets within the armed forces would not be held accountable for their actions, thus making the relations between the society and the military even worse.

## **B. LAW IN THE MODERN STATE AND IN CIVIL-MILITARY RELATIONS**

The highest development of the modern nation state, at least aspired to by the Western World, appears to be the development of political control under democratic principles. The highest moral principle in justifying political power is undoubtedly democracy. Furthermore, democracy is often equated with the rule of law in such a way that most regimes, democratic or not, rest exacting emphasis on the state's relationship to law and its legal institutions. Legal norms are used by regimes to establish predictability over who can decide what. The central attribute of the modern impersonal state is the rule of law, the so-called *Rechtsstaat*.

The *Rechtsstaat* is the kind of state, which has been established in Western Europe and North America since the eighteenth century. The Europeans, and the United States of America have been the leaders in corresponding to the demands for civil freedom and containing definite guarantees of this freedom. The guiding principle of the *Rechtsstaat* is to protect the freedom of the individual against state power.<sup>22</sup> Indeed, within that kind of state the freedom of the individual is in principle unlimited, whereas the authority that the state has to intervene in this sphere is by definition limited. All state interventions are to be regarded as exceptions that must be carefully justified. Provision is made for mutual control and binding of the state apparatus: The power of the state-which

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<sup>22</sup> Rune Slagstad et al, *Constitutionalism and Democracy*, Cambridge University Press, 1988, p. 104.

is in principle limited-is customarily divided into executive, legislative, and judicial functions, combined in a normative system designating spheres of competence. Therefore, the *Rechtsstaat* is a legal state because all administrative authorities, especially that of the military and the security forces is subject to the conditions and the procedure of law, and state intervention is permissible solely on the basis of a law. Rulers act *auf Grund eines Gesetzes* (“on the basis of a law”) or *im Namen des Gesetzes* (“in the name of the law”). The state authorities perform their duties only by following the existing positive norms in a competent way. The legitimacy of the state rests on the legality of all its exercise of power.<sup>23</sup>

However, this legality has its own set of problems. In its positivist version, legality does not require democracy; it is not concerned with the issue of how rules should be enacted or who has the right to hold office and thus provide the regime with legitimacy. Legality has been used as an excuse by many totalitarian regimes in justifying the use of arbitrary power, despite little pretension to legitimacy, and helped them to ensure a legal coherence. It was legal experts, law professors that provided the Nazis with a philosophical cloak for their crimes, and introduced the *teleological method* of judicial interpretation with which the Third Reich applauded all its evils as “supremely just.” Since then, there have been many cases of despotic regimes hidden behind the legal “rituals” adding surplus value to legality alone; such were the cases, among others, in the military dictatorships in Latin America, and the repressive regime in the former Yugoslavia. Therefore, it is essential for legality to be linked with legitimacy, which is only obtained by political procedures such as free elections.

The problems arising in the striving for good government and the rule of law are especially germane within the framework of civil-military relations. The military are not just an autocratic institution demanding complete loyalty and commitment, but most importantly, they are designed to bring force to bear in the most efficient way possible, whenever the state requires it. Hence, law is a valuable political instrument that can enforce its practical demands by means of sanctions, and set standards for desired behavior. The positivisation of normative expectations into law enables the stabilization

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<sup>23</sup> Ibid., p. 106.

of the preferable norms and simultaneously the coordination and obedience of the armed forces in our complex modern societies. Therefore, the function of institutionalized normative expectations, which have been perceived as legitimate, is vital for the evolution of civilian supremacy: In civil-military relations law is used to create relative forms of stability and obedience to the elected civilian authorities.

Additionally, legal regulations have much to offer as a tool in the social context of the civil-military relations. Certainly, the forms and the more specific relations of legal and social problem solving constitute vital parts of the structuring and the characteristics of modern societies. Therefore, certain problems may be temporarily solved by legal regulations while at the same time the apparatus may be erected to continue search for a more socially based solution mechanism. Law is only one of society's institutions designed to solve problems, but it is the one with the power.

### **C. WHY INTERNATIONAL LAW?**

It is exactly this need for civilian democratic control that led civilian authorities to use law and legal institutions as part of the machinery for controlling the armed forces. Because states regard themselves as the source of law and order within their boundaries, the question still remaining to be answered is why should international law be used and what particular legal institutions are necessary to maintain and affirm the civil-military relations balance.

In trying to provide a reasonable and logical answer to the above question, one has to consider that today the continued existence of any government, particularly a democratic one, depends not only upon respect for the domestic law, but also relies upon respect by all other governments for at least several minimal provisions of international law, e.g., their boundaries, and their existence. Many international rules impose domestic limitations on the government's power, by the shake of their own legal order, i.e. their Constitution. Therefore the military being subject to the Constitution of its state is intrinsically bound by international law. This does not imply that all legal techniques that are effective domestically would be equally successful when introduced within the

international community with regards to the armed forces. It is nevertheless a useful tool, which has to be used. It should be best understood as a tool for international security, not as an alternative to force or to politics, but as a way of structuring political, and social forces. It can serve the notion of balance of power both in the international and in the domestic arenas by bringing limitations upon the military, i.e., by changing doctrines, attitudes, and traditions.

Indeed, the establishment of formal international institutions, e.g., committees, procedures, and courts has as its primary purpose to hold governments and the state apparatus-including the armed forces, militia, and the police-accountable for their activities. This process is done in a way that necessarily invades domestic sovereignty. It influences the crafting of constitutions and legislatures in a way that immediately limits or re-orientes the conduct, the roles and the missions of the military. Likewise it becomes necessary to educate servicemembers in these norms because sometimes international law is important in their new missions, e.g., Military Operations Other than War (MOOTW) or, under the new terminology, Stability Operations. Finally, national and international legal and political institutions have as their by-products aspiring norms thus changing values and traditions.

In a higher level of analysis several more explanations may be suggested. The realist school of thought asserts that the most powerful democracies seek to externalize their values, coercing weaker or less democratic governments to accept their notion of international regimes, and their subsequent obligations. The liberal, idealist school argues that the most established democracies seek to externalize their own values by setting a transnational process of diffusion and persuasion that socializes less democratic governments to accept their regimes. Another argument suggests that it is not the most powerful or persuasive democracies that favor enforceable-and not just rhetorical-international obligations, but also the weakly established democracies. Their governments pursue that kind of commitments for reasons of self-interest: they help establish democratic governance against non-democratic domestic opposition.

Whatever the preferable approach, the adoption of international tribunals and transnational juridical bodies in general is growing. During the Cold War both the bipolar split in world politics and its aggravation of tensions between the developed and

developing worlds hobbled international institutions. Today, the end of the Cold War has loosened many of the blockades to international lawmaking and implementation. In that perspective, the recent adoption of the International Criminal Court on April 11, 2002 by the United Nations looks most promising; no country and no individual is out of its jurisdiction.<sup>24</sup> Furthermore, the success of such an institution will further encourage the domestic courts and other extra judicial mechanisms at a national level, helping to provide regional and international security.

Nevertheless, it is the future practice that will reveal the real potential of this new court as an achievement of mankind or as another failure due to power politics. Hence, for understanding the danger of failure because of the dynamic and continuous relationship between international law and politics, a brief review of relevant concepts and developments in international law seems necessary, especially with regards to the transition from state to individual accountability.

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<sup>24</sup> Although the predominant one, the U.S. opposes this view. As discussed in Chapter V of the present thesis during October 2002 separate arrangements were made between the E.U. and the U.S. that will provide a degree of immunity for U.S. citizens from prosecution by the ICC.

### **III. REVIEW OF RELEVANT DEVELOPMENTS**

#### **A. INTERNATIONAL LAW (IL) AND STATE PRIMACY**

##### **1. The State is the Primary Subject**

The paramount purpose of international law was and is the regulation of the relations between states, under the scope of providing stability in international relations and an expectation that certain acts or omissions will affect predictable consequences. It consists of rules that states consider binding in their relations with each other might that be customary international law<sup>25</sup> or international agreements.<sup>26</sup>

In brief, the sources of international law as appear in Article 38 of the Statute of the ICJ, are: the international conventions establishing rules expressly recognized by the contesting states, the international customs as evidence of a general practice accepted as law, the general principles of law recognized by civilized nations, and finally the judicial decisions and teachings of the most highly qualified publicists of the various nations.

A subject of international law is an entity that is capable of possessing international rights and duties and furthermore, having the capacity to maintain its rights by bringing international claims.<sup>27</sup> Furthermore, an entity recognized by customary law as capable of possessing rights and duties, and bringing international claims, and having these capacities conferred upon it is a legal person.

Within classical international law, states are considered to be the primary subject. Explicitly, the state's territory, its appurtenances (i.e., its airspace and territorial sea), its government and population within its borders, compose the physical and social manifestations of the state as the primary international legal person. Apart from states, organizations may have legal personality in the international plane, if certain conditions are satisfied. Because of the complexity of international relations and the absence of a

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<sup>25</sup> Customary IL is the general and consistent practice among nations with respect to a particular subject, which over time is accepted by them as a legal obligation. It has to be distinguished by usage, which is a general practice that does not reflect a legal obligation contrary to custom.

<sup>26</sup> An international agreement, e.g., bilateral treaties, executive agreements, multilateral conventions, is a commitment entered into by two or more nations that reflects their intention to be bound by its terms in their relations with one another.

<sup>27</sup> *Reparation for Injuries* case, ICJ Reports (1949), 179 as it appears in Ian Brownlie, *Principles of Public International Law*, fifth edition, Oxford University Press, 1998, p 57.

centralized law of corporations, the legal situation is quite complex (e.g., the individual is regarded in certain cases as a legal person, and yet it is more than obvious that the individual alone cannot sign treaties). Therefore, the listing of entities with legal personality in the international level for particular purposes is considerable.<sup>28</sup>

In accordance with the international law's framework, the rule is that it is the state is responsible for international wrongs or for conduct in breach of international obligations, hereafter author state, because they have consented so. In fact in 1927, the PCIJ in the *Lotus Case* (France v. Turkey) stated that:

International law governs relations between independent States. The rules of law binding upon states therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing communities or with a view to the achievement of common aims.<sup>29</sup>

The ICJ has also affirmed this classic pronouncement in the *Lotus Case*, that states are bound only by rules of international law which they have consented to, as late as 1986 and 1996 in the cases of *Nicaragua* and in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* respectively.<sup>30</sup>

This emphasis on the state is consistent with the environment in which international law originated, i.e., a world of independent, equal and sovereign states, the only major actors in the international arena. In this international arena, unlike in domestic societies, individuals had for many years no standing to assert any legal right. They obtained rights only derivatively, by virtue of the protection afforded to the individual by

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<sup>28</sup> The established legal persons in a simplified approach are the state, the political entities legally proximate to the state, the *condominia*, the internationalized territories, the international organizations, the state's agencies, and the agencies of the different organizations. Special types of personalities include non-self governing peoples, states in *statu nascendi*, legal constructions, belligerent and insurgent communities, entities *sui generis*, and individuals. Controversial issues include entities that are given international status by the virtue of international treaties, i.e. intergovernmental corporations of private law and other entities that operate transnational, have resources greater than those of a state and they may have diplomatic support from governments.

<sup>29</sup> (1927) PCIJ Rep., Series A, No. 10, at 18-19. This is quoted in Kriangsak Kittischaisaree, *International Criminal Law*, Oxford University Press, 2001, p. 5.

<sup>30</sup> Kriangsak Kittischaisaree, *International Criminal Law*, p. 10.

nationality. Hence, international responsibility and liability was connected with state being the subject of international law.

## **2. International Responsibility and Liability of the State and the Expanding Reach of International Law**

In international law the invasion of the legal interest of one subject of the law by another legal person creates international responsibility. In fact, today responsibility is regarded as a general principle of international law, “a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties.”<sup>31</sup> If one state violates the law, it may expect that other states will reciprocate. Likewise, failure to comply with international law usually involves political and economic risks of such magnitude that states are thereby reluctant to breach international law. The nature of this state responsibility relates both to breaches of a treaty and to breaches of a legal duty, and is not based upon delict in the municipal sense. As it was stated in the case of the *Spanish Zone of Morocco Claims* “all rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.”<sup>32</sup> Likewise, in the *Chorz'ow Factory* the Permanent Court of International Justice (PCIJ) stated in its judgment not only that the obligation to make reparation is a principle of international law but there is also “no necessity for this to be stated in the convention itself.”<sup>33</sup> Later on, in 1949, the ICJ in the case of the *Corfu Channel* held Albania responsible under International Law for the damage and the losses of human life which resulted due to the absence of a warning about mines in her territorial waters, and that there was a duty for Albania to pay compensation to the injured state, the United Kingdom. Therefore, the legal liability attaches to the transgressor state to provide reparations, including cessation, which constitutes the means to discharge the responsibility incumbent upon it as a result of its international delict or crime, and should always be adequate to remedy that internationally wrongful act. Furthermore, since reparation has a normative character, the

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<sup>31</sup> Ian Brownlie, *Principles of Public International Law*, p. 436.

<sup>32</sup>(1927) PCIJ, Ser. A , No 9, p.21. See Ian Brownlie, *Principles of Public International Law*, p. 437.

<sup>33</sup> (1928) PCIJ, Ser. A, No 17, p.29. See Ian Brownlie, *Principles of Public International Law*, p. 438.



consequences of an international delict have to be less severe than of an international crime.

Moreover, the injured state is entitled to invoke the responsibility of the author state and demand reparation in the form of cessation, restitution in kind, compensation, satisfaction, and in guarantees and assurances against repetition, either singly or in combination. Enforcing reparation involves the issues of countermeasures<sup>34</sup> (e.g. trade embargos), and the use of force. Resort to such measures intends to coerce the author state in fulfilling its obligations with regards to the injured state either by non-military means or with the use of military force. In particular, states are under the obligation to refrain from the use of force generally. However, the use of the military under the UN Charter is justifiable under the Articles 42, where the Security Council can authorize the use of force to maintain or restore international peace and security, and 51, for matters of self-defense. The reasonable disputes and questions regarding reparation and the use of force, real or imagined, may call for adjudication by the ICJ, although in case of international crimes it is very unlikely that the author state will agree on the ICJ's adjudication.

However, with respect to international crimes and the obligation of guarantees against repetition, certain measures can be legally taken that can provide deterrence and assurance against repetition. In most cases such measures are not just verbal declarations, or forwarding through administrative channels instructions or directions to the author state's officials. Instead,

The scope of guarantees against repetition to be provided or implemented by the author State ought to be expected in case of international crimes, and this must be seen to constitute special or supplementary consequences of the regime of crimes. The two main categories of guarantees are those related to the police, paramilitary and armed forces, and those related to the State organization. Appropriate guarantees within the first category may include obligations regarding disarmament, dismantling of war industries, destruction of weapons, re-organization of the police, paramilitary or armed forces, and the admission of observation teams. Appropriate guarantees related to the State organization may include obligations for the prosecution and punishment of those responsible for the commission of the crime, the prohibition of specific political groups or parties, a change of government, constitutional changes, the holding of free elections, and respect for human rights. Guarantees against repetition, which are either demanded or imposed should not amount generally, to an imposed settlement of disputes or to the loss of territory or political independence. An exception regarding this latter position would

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<sup>34</sup> Measures adopted by way of reciprocity and reprisal consisting of non-military actions admitted by international law, with a view to the maintenance of international peace and security.

be constituted by a situation in which the author State of an international crime targeted a specific ethnic people. In such a case the people concerned should be allowed, as a guarantee against repetition, to exercise its right of self determination.<sup>35</sup>

Furthermore, the problem of states having obligations towards the international community adds to the complexity of the issue. The ICJ in the *Barcelona Traction* case, proclaimed the distinction in the legal interest that every state has in the observance of obligations *erga omnes*, or obligations towards the international community as a whole, between obligations vis-à-vis states. As examples of acts that can be characterized as being subject to obligations *erga omnes*, all of which could be classified as peremptory norms of international law, it named the rules concerning the basic rights of the human person, including protection from slavery and racial discrimination, and the prohibition against aggression and genocide.

Explicitly, the ICJ distinguished between obligations within the state and obligations towards the international community as follows:

An essential distinction should be draw between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State....By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligation *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human persons, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law....; others are conferred by international instruments of a universal or quasi-universal character.<sup>36</sup>

But its existence, an *actio popularis* in the above sense, depends on the further institutionalization of the international community, as a personified international community, willing to approve and enforce it. Unfortunately, “the international community still faces an impediment to its assertion of *actio popularis*.”<sup>37</sup> Hence, a few years after that ruling, the ICJ in the case concerning East Timor (*Portugal v. Australia*) ruled that even if one state has a legal standing because of the *erga omnes* nature of the

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<sup>35</sup> André de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical inquiry into the Implementation and Enforcement of the International Responsibility of States*, Kluwer Law International, 1996, p.195-196.

<sup>36</sup> Case Concerning the Barcelona Traction, Light and Power Company, Limited (Second Phase), ICJ Rep. 1970, 3 at 32. This is quoted in Kriangsak Kittischaisaree, *International Criminal Law*, p 11.

<sup>37</sup> This is quoted in Kriangsak Kittischaisaree, *International Criminal Law*, p 13.

rights involved, the author state must have consented to the jurisdiction of the court. The ICJ while fully shared the *erga omnes* character of the claim (the self-determination of the people of East Timor), cannot rule on the lawfulness of the conduct of the author state (Indonesia) if the latter is not a party to the case. Hence, the notion of state consent prevented the use of international legal standing against an international crime.

Nonetheless, one of the contemporary developments in international law is a gradual recognition that individuals may, under certain circumstances, be “subjects” of international law. The latter implies that now the individuals may have rights and obligations following directly from international law and not merely derivate from their state nationality. This concept received a major thrust forward at the end of the Second World War, with the International Military Tribunals at Nuremberg and Tokyo, and with the adoption of the United Nations Charter and its emphasis on human rights. Likewise,

The acceptance of the so-called Nuremberg principles recognized that individual Nazi leaders, not just the Nazi state, were criminally responsible for war crimes, crimes against humanity, and crimes against peace, and should be tried by an international tribunal convened by the allied states. The crimes for which they were tried, including atrocities against nationals of their own states, were considered to be international crimes.<sup>38</sup>

However simple or complicated the above may seem, experience has shown that they present an extremely dense issue. The magnitude and the character of matters like the prosecution of former political and military leaders (even after negotiated arrangements), nation building, and peacekeeping operations remains problematical.

Nevertheless, in the light of the evolvement of international criminal law and the enforcement of the International Criminal Court many states worldwide share the hope that a substantially forced regime of responsibility applicable to international crimes may fruitfully be elaborated. Hence, a more insightful look at the development of international criminal law, human rights and humanitarian law will be helpful in order to realize the difficulties and the shortcomings of the transition from the responsibility of the state to the individual. For reasons that will become obvious throughout this thesis the subjectivity of the individual in contemporary international law is still controversial; an interesting observation since international law aims at regulating human relations and has been originated in the necessity of intercourse between human beings.

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<sup>38</sup> Horace B. Robertson, Jr., *Contemporary International law: Relevant to today's world?*, Naval War

## **B. INTERNATIONAL CRIMINAL LAW (ICL) AND STATE SOVEREIGNTY**

International criminal law is the discipline of law that governs international crimes, the convergence of the protection of the victims of armed conflict, and the international aspects of domestic, national criminal law. It basically embraces two essentially different groups of legal rules: The legal rules originated by domestic or municipal sources of law trying to regulate facts that have international character, and the substantive, procedural rules derived from public international law.<sup>39</sup>

The determination of the category of crimes that can be characterized as international is set by the international community, and therefore can be prosecuted before an international tribunal, whether permanent or *ad hoc*. In accordance to the U.S. Military Tribunal at Nuremberg, an international crime is “such act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances.”<sup>40</sup>

Compared to the other branches of law, international criminal law has been relatively slow in crystallization as a clearly viable system mainly due to issues regarding the state sovereignty and the international power play. Until today states have still not been willing to consent to the general prosecution of their citizens before an international tribunal. Therefore, the right residing to any member of the international community to take legal action in the terms of a public interest as *actio popularis*, has been hollow in practice. Any sovereign act performed in the territory of a foreign state, such as measures in terms of criminal proceedings, constitutes a violation of its sovereignty; this can be performed only if the latter agrees either in general (e.g. by statute or treaty) or in terms of a specific declaration for a specific case. However, there is precedence of significant exceptions, such as the two International Military Tribunals after the end of the Second

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College Review, Vol. 45, 89:103, Summer 1992, p. 95.

<sup>39</sup>M. Cherif Bassiouni, Vet Nanda, et al, *A treatise in International Criminal Law*, Vol. 2, Thomas, 1973, p. 135.

<sup>40</sup> Hostages Trial, US Military Tribunal at Nuremberg, 19 Feb. 1948 (1953) 15 Ann. Dig. 632 at 636. This is quoted in Kriangsak Kittischaisaree, *International Criminal Law*, p. 3.

World War, and the two United Nations Tribunals after the end of the Cold War. Furthermore, in July 1998 the international community succeeded in adopting the Statute of the ICC after a fifty years ongoing debate, giving hope to the idea of an international criminal justice that could serve in the new era of globalization.

Within the aforesaid precedents, the practical necessity of exercising international criminal jurisdiction, and enforcement mechanisms has risen. Hence, within international criminal law the question of offences became and is currently closely connected with the question of the machinery in which international criminal jurisdiction is exercised. In addressing this issue, four *ad hoc* tribunals have been established in the course of the twentieth century: The International Military Tribunal (IMT) sitting at Nuremberg, the International Military Tribunal for the Far East (IMTFE) sitting at Tokyo, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sitting at The Hague, and the International Criminal Tribunal for Rwanda (ICTR) sitting at Arusha. Likewise, within the last eighty-three years, as the world's major political powers saw fit, five investigatory commissions were established, namely: The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties, investigating crimes occurring during the First World War, the 1943 U.N. War Crime Commission, which investigated crimes during the Second World War, the 1946 Far Eastern Commission, which investigated Japanese war crimes during the Second World War, the Commission of Experts Established Pursuant to Security Council Resolution 780, to investigate violations of international humanitarian law in the former Yugoslavia, and finally the Independent Commission of Experts Established in accordance with Security Council Resolution 935, the Rwanda Commission, to investigate violations committed during the Rwandan civil war. Although the above international prosecutions started with the establishment of international commissions, their work was not always particularly relevant to the subsequent prosecutions.<sup>41</sup> Yet, with the creation of these tribunals, it is indeed true that a considerable advancement has been made in the development of international criminal law; they have clearly sidelined the notion of sovereignty of states.

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<sup>41</sup> M. Cherif Bassiouni, *The Statute of the International Criminal Court: A documentary history*, Transnational Publishers, 1998, p 6-7.

The unconditional military surrender of Germany and Japan, at the end of the Second World War, resulted in the creation of ITM and IMFTE. On August 8, 1945, an agreement was signed by the United States of America, the United Kingdom, the provisional Government of France, and the Union of Soviet Socialist Republics-later adhered to by nineteen other states- to prosecute and punish the major war criminals within the European Axis Powers, “acting in the interests of all the United Nations,” establishing the Charter of International Military Tribunal at Nuremberg as an annex to the agreement. On December 11, 1946, by Resolution 95(1) the General Assembly of the United Nations affirmed “the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”<sup>42</sup> Moreover, following the European precedent, on January 19, 1946, the International Military Tribunal for the Far East was established for the apprehension, trial, and punishment of war criminals in the Far East. From their judgments, which will be discussed more extensively in the following chapters, these IMTs clearly demonstrated that the individual himself could be held responsible for crimes against international law. This *ad hoc* tribunal machinery continued later in the twentieth century with the implementation of ICTY and ICTR as the enforcement by the U.N. Security Council (U.N.S.C.) of Chapter VII of the United Nations Charter in the former Yugoslavia and in Rwanda, respectively.

After the experience of the *ad hoc* tribunal machinery, the idea of a permanent international court, free from political manipulations, seems to be maintaining the momentum of the international criminal law’s toolkit. Although the International Criminal Court is established under a multinational treaty and not as an *ad hoc* body under U.N. Security Council control,<sup>43</sup> its adoption on July 17, 1998 and its entrance into force on July 1, 2002 highlights a new approach of exercising international criminal jurisdiction.

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<sup>42</sup> M. Cherif Bassiouni, Vet Nanda, et al, *A treatise in International Criminal Law*, Vol. 1, p. 114.

<sup>43</sup> This made the United States of America unwilling to participate in the new court.

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### C. INTERNATIONAL HUMAN RIGHTS LAW (IHRL) AND INTERNATIONAL HUMANITARIAN LAW (IHL)

International human rights law and international humanitarian law are complementary. Humanitarian law applies in armed conflicts whereas human rights protect the individual at all times; human rights are concerned with the organization of the state vis-à-vis the individual. Both seek to protect the individual but they do so under different circumstances. They both contain proscriptions against torture, genocide, slavery, and extra judicial killings. Furthermore, international human rights law today applies to both individuals vis-à-vis the government and to non-state actors who commit human rights abuses e.g., terrorists, and armed opposition groups etc....

International human rights law and international humanitarian law overlap and, when seen together, they share the same objective at all times, namely the protection of human life and dignity. Hence, the major codifications of the international humanitarian law although they scarcely provide for human rights *per se*, they protect exactly what human rights stand for: the 1949 Geneva Conventions with their two additional protocols, and the Convention on the Prevention and Punishment of the Crime of Genocide indeed guarantee the protection of human rights during an armed conflict.<sup>44</sup> The existent codification has been further enriched with the jurisprudence of the two United Nations *ad hoc* tribunals for the former Yugoslavia and Rwanda.

Contrary to the international humanitarian law, which dates back to antiquity,<sup>45</sup> the development of human rights law started after the Second World War. However, human rights law evolved very fast; in fact within the human rights field, widespread acceptance of treaties, declarations, resolutions, and other instruments arguably has become more significant than actual practice in creating binding law.<sup>46</sup> The founding of

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<sup>44</sup> The U.N. bodies decided to exclude all discussion of the law of war from their work (the law of war was not included in the U.N. International Law Commission) mainly because there was the fear that by considering that branch of law may undermine the force of *jus contra bellum*. The latter would undermine the confidence in the U.N.'s ability to maintain peace. See Robert Kolb, *The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, International Review of the Red Cross, No 324, 30 September 1998, p. 409-419. Available [online] at: <http://www.icrc.org/Web/eng/siteeng0.nsf/iwplList168/85C81A4753C25BA9C1256B66005B30B3>,

6/28/2002.

<sup>45</sup> Ibid.

<sup>46</sup> Frank Newman & David Weissbrodt, *International Human Rights: Law, Policy, and Process*, 2<sup>nd</sup>



the United Nations in 1946 and the subsequent Universal Declaration of Human Rights clearly comprise the major efforts assuming a very important role in enforcing and implementing human rights. Moreover, an important institution building with regional mechanisms outside the United Nations evolved over these years.

The primary sources of international human rights law are treaties, with the U.N. Charter and the International Bill of Human Rights the most prominent of them and also containing seminal human rights provision. Likewise, the Universal Declaration of Human Rights forms part of the International Bill of Rights, together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Declaration sets out the human rights as principles, lays out their objectives and carries moral weight.<sup>47</sup>

Unlike the Declaration, the Covenants have the force of law. Those who sign these documents have not only a moral, but also a legal obligation to respect the contained therein terms. Once a Covenant is signed, it must be accepted and ratified by a country's own parliament or equivalent legislative body to become law (*pacta sunt servanda*).

In addition to the U.N. mechanisms for implementing human rights, regional structures now operate in Europe, the Americas, and Africa with the European system being the most fully developed of those structures. The Convention on Human Rights was opened for signature in Rome on 4 November 1950 by the European Council, and was enacted on 3 September 1953. The purpose of the Convention was, as stated in the Preamble, to achieve greater European unity through a common understanding and observance of human rights, and to take the first steps towards collective enforcement of certain of the rights, as stated in the Universal Declaration of Human Rights and adopted by the General Assembly of the United Nations on 10 December 1948.<sup>48</sup>

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ed., Anderson Publishing Co, 1996, p. 18.

<sup>47</sup> It must be noted that although the Declaration may itself fall short of being enforceable upon states, many of its provisions are at the very least binding against them because of customary international law. Also, a very large number of laws and legal documents are based on the principles of the Declaration. Many countries have cited it or included its provisions in their basic laws or constitutions and many human rights covenants, conventions and treaties concluded since 1948 have been built upon its principles.

<sup>48</sup> By virtue of the Convention, the Contracting States undertook to secure to everyone within their jurisdiction, a number of rights and freedoms set forth in the Convention. The rights guaranteed include the right to life, prohibition of torture, right to liberty and security, right to a fair trial, right to respect for private and family life, and freedom of expression.

In addition, the Convention set up a control mechanism for enforcing the undertakings of the contracting states. It allows not only states but also individuals to take proceedings against a contracting state responsible for alleged breaches of the Convention. The right of individual petition is of crucial importance and lies at the very heart of the Convention's system of protection.

Since the Convention was enacted, eleven protocols have been adopted. Protocols 1,4,6, and 7 add further rights and liberties to those guaranteed and Protocol 2 confers on the European Court of Human Rights (ECHR) the ability to give advisory opinions. Protocol 11 restructures the enforcement machinery. The remaining protocols concern the organization of, and procedure before, the Convention institutions.

ECHR in particular, is an independent judicial institution in the normal sense of the term, with one judge from each member state of the Council of Europe and a public procedure. A case may be brought before the Court by the Commission or by a state concerned in the case. Its judgments are final, binding, and declaratory in nature.

The Court is called on to review actions of legislative, executive and judicial authorities in the western democratic member states. If the Court finds a violation of the Convention, it has no power to quash the decisions of the national authorities or to order remedial or consequential measures. It may, however, award "just satisfaction" in the form of financial compensation. The judgments are transmitted to the Committee of Ministers, which supervises their execution.<sup>49</sup>

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<sup>49</sup> The states becoming parties to the Convention are already committed to upholding human rights. According to Article 3 of the Statute of the Council of Europe, human rights protection is crucial for membership. As could be expected, the Court does not in practice have to deal with allegations of wide scale violations of human rights. The Court has had to consider cases concerning the arrest and detention guarantees (art. 5), the right to a fair administration of justice in civil and criminal proceedings (art. 6) in member countries. In addition to the "judicial procedure" cases, a wide range of other issues have come up for decision, such as the absence of access to the courts to challenge the legality of decisions by administrative authorities and professional bodies, the legal status of children born out of wedlock, the taking of children to public care, immigration, expulsion, extradition, homosexuality laws, the language provisions governing elections to regional legislative assemblies, compensation for nationalization of ship-building and aircraft industries, rent control laws, telephone tapping, allegations of prejudice as a result of not belonging to particular trade unions, trans-frontier broadcasting, the freedom of speech, etc. The Convention strikes a subtle balance between the sovereignty of the contracting states and power of review of the Convention institutions. The latter have developed a number of principles of interpretation. The most important of those principles are the "autonomous" nature of the concepts in the Convention as compared with similar concepts in the domestic legal systems, the evolutive interpretation of the text to keep the Convention's guarantees adapted to the changing needs of the society and the "margin of appreciation," or area of discretion left to the member states in the implementation of the guaranteed rights.

Many of the cases dealt with by the Court have led to changes in the law and practices of the state concerned. The operation of the Convention system as described, has given rise to a *corpus* of Convention law, which radiates an influence beyond the individual case so that other states will look to the judgment for guidance on the compatibility of their own law and practice. On many occasions this has prompted a state, which was not a party to the case, to amend its legislation or adapt its case law. That is the real impact and importance of the ECHR's judgments.

The European Convention on Human Rights does not institute a system intended to replace national human rights protection. On the contrary, as the Court has said on several occasions, it is of a subsidiary nature. The primary responsibility lies with the contracting states, in particular with their judiciary. This is reflected in the rule that no state has to answer before the Convention bodies before it has had an opportunity to redress the alleged wrong within the context of its own procedural order. The success of the system described depends upon the co-operation between domestic courts and the ECHR. The trend today is, in the case law of the Supreme Courts in member states, to follow the interpretation adopted by the ECHR.

#### **D. THE ENFORCEMENT OF INTERNATIONAL LAW AND TRANSNATIONAL JURIDICAL BODIES: A PROPOSED DEFINITION**

One of the principal criticisms of international law is that the means of enforcing sanctions against the breaching nation is highly problematic. For the most part national courts regulate rules that have international character, and states are bound by their consent. Moreover, international law is obeyed by states under the traditional methods of diplomatic negotiation, good offices, conciliation and mediation. Nevertheless, international machinery exists to ensure the protection of certain important interests and values both for states and individuals.

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In most of the contracting states the Convention has been incorporated into national law. While the contracting states are not obliged to incorporate the Convention, incorporation enables the national judge to consider a case under the provisions that may be at issue before the Convention. Thus, the need to lodge petitions in Strasbourg is reduced or eliminated. Even as regards countries where the Convention is not incorporated into national law, it is legally binding on the state as a contracting party. The provisions of the Convention and the case law of the Court are used as a means of interpretation wherever elucidation of the fundamental rights and freedoms of the individual under national law is required.

This machinery includes widely different bodies with rather few commonalities; from third party adjudicative mechanisms and dispute settlements to criminal tribunals and a new criminal court. Furthermore, private parties are increasingly playing a role in international dispute mechanisms. In fact, the second half of the twentieth century and the beginning of the twenty first will most probably be remembered by mankind's efforts to establish an international order that includes justice, particularly after the Cold War ended. All these existing international dispute settlement entities are so diverse and different that, as Cessare Romano argues, it has been difficult for international legal scholars to

[F]ind a single name suitable to identify all of the international bodies....International legal scholars use the broad designation of 'dispute settlement bodies.' Since 1994, however, this term has become increasingly inadequate to describe the efforts to promote the international rule of law. In particular the international criminal courts for the former Yugoslavia and Rwanda and the future permanent criminal court cannot be regarded as 'dispute settlement bodies.' They do not 'settle a dispute' on a point of law or fact between two subjects (States, international organizations or individuals); rather, they apply international humanitarian law, or international criminal law (provided that such a body can identified), to individuals. They do not exercise, therefore, a contentious or an advisory jurisdiction but rather an implementation function. They do not provide an alternative to the use of force, like all dispute settlement bodies, but rather are the tragic consequence of its use.<sup>50</sup>

Hence, a new broad definition is proposed, in order to cover not only the dispute mechanisms of the international community, but also the two post second World War *ad hoc* International Military Tribunals. Thus, the term "Transnational Juridical Institutions" seems to be adequate in describing courts, administrative hearing bodies, and other juridical institutions that make rulings and apply international law as last resort tribunal-solving disputes between nations, international organizations, or individuals. These courts speak with finality, and their rulings serve as a source for international law. They can be widely representative, truly international or regional in composition, and they can be either military or civilian institutions. They can be with or without any supervision or oversight, and they can modernly claim jurisdiction over states as well as individuals. In particular their jurisdiction can be either limited or expanded worldwide; even to countries that have not agreed to membership.

Examples of such Transnational Juridical Institutions are the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) - or else the World

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<sup>50</sup> Cesare P. R. Romano, *The Cost of International Justice*, p. 2.

Court, the International Military Tribunals (ITM) in Nuremberg and Tokyo, the International Tribunal for the Law of the Sea (ITLOS), the Court of Justice of the European Union, the European Court of Human Rights (ECHR), the Central American Court of Justice, the Inter American Court Of Human Rights (IACHR), the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Tribunal for Rwanda (ICTR), the International Criminal Court (ICC), etc....

From all these bodies, the ones that tried to end the impunity of atrocities and human rights violators, namely the two IMTs, the ICTY, and the ICTR hold a distinct position. Millions of innocent lives have been lost in war and at the hands of oppressive governments with the military as executioners of their plans, sharing the spoils of power holding. Non-fulfillment of obligations accepted by the majority of states to punish the architects of such policies ended with the establishment of and the punishment received from these tribunals. The latter do not only provide a major improvement for international law, but also a catalyst for bringing states that participated in gross inhumane acts closer to democracy and their military closer to democratic civilian control.

## IV. THE INTERNATIONAL MILITARY TRIBUNALS

### A. HISTORICAL BACKGROUND: FROM THE LATE EIGHTEENTH CENTURY TO THE END OF THE SECOND WORLD WAR

It was very common historically for mankind to view war and actions of the armed forces mainly in terms of causes and effects. Little attention was given to moral and legal ramifications. It was all about winners and losers; the ultimate good was victory at all costs. The International Military Tribunals in Nuremberg and Tokyo changed the way the world viewed wars, and crimes associated with them. Their historical background is very important in order to appreciate the settings and the circumstances accompanying the tribunals. Both of these International Military Tribunals were established in the aftermath of the Second World War to prosecute individuals for crimes against peace, war crimes, and crimes against humanity. As Telford Taylor states, “Ask the passerby what the words ‘war crimes’ bring to his mind, and the chances are the reply will be ‘Nuremberg.’”<sup>51</sup>

The conditions that gave rise to the laws of war, as we know them today are products of the changes in the eighteenth and nineteenth centuries with the consequent changes in the customs and practices of war. Especially after the Thirty Years War (1618-1648) that had left much of Europe a shambles, significant change emerged.

From these disastrous years, military lessons were learned. Soldiers who were regularly fed and paid, and who did not have to forage for food and shelter, could be disciplined and trained to a pitch of efficiency that greatly raised the tactical level of operations. Troops were organized under a regular chain of command, in battalions, regiments, and other standard units. Administrative staffs handled supplies, pay, and other logistical necessities. Military police helped enforce discipline, and procedures something like courts-martial were established to punish offenders.

Thus soldiering became a profession, and the distinction between soldier and civilian was stabilized. And so were born the customs and rules governing the conduct of occupying troops, requiring respect for their lives and livelihoods of the civilian inhabitants, as long as they remained non-combatants.<sup>52</sup>

However, the elements of the laws of war remained largely unwritten in any official sense. These uncoded laws were known as customary international law. It was

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<sup>51</sup> Taylor Telford, *The Anatomy of the Nuremberg Trials*, Back Bay Books, 1992, p. 6.

<sup>52</sup> Ibid, p.6.

not until 1899, when the international breakthrough occurred with the signing of The Hague Conventions, and the follow-on Convention in 1907, on the laws of land warfare. Before that, committing crimes during war was rarely recognized as unlawful; the constraints on the conduct of war, *jus in bello*, were largely ignored. Therefore, two world wars had to occur before any significant changes happened and measures were adopted. Explicitly the question of punishing war criminals was answered only under the shadows of the failure war crimes trials of the First World War. For it was the First World War that showed the extend to which international justice could be compromised for the sake of political expedience.<sup>53</sup>

The latter has a lot to do with the way the First World War was fought, and the ineffective punishment the war criminals received after it. It was from the very beginning of the First World War Kaiser Wilhelm II and his general staff conducted German war operations in such a way that fear, hate, and chaos was raised in a way comparable to that achieved later in time by the Third Reich. After the First World War ended, the pressure for punitive action against Germany was overwhelming with the strongest pressure coming from the British Empire, which was bearing the brunt of the U-boat and Zeppelin operations. Likewise, due to his election campaign, the British Prime Minister at the time David Lloyd George, wanted to put the German Kaiser Wilhelm II on trial as responsible for a war of aggression.

Moreover, the pressure of public opinion in the Allied countries made them to establish a Commission to inquire and report the violations of international law alleged against the Central Powers, on January 25, 1919. Hence, during March 1919 the Commission adopted a report in which, among others, advised the establishment of a “High Tribunal” Leipzig (1921) to conduct trials of war criminals falling within international criminal jurisdiction. All persons belonging to the enemy countries who had violated the laws and customs of war or the laws of humanity, including heads of states, would be held liable to criminal prosecution. The Commission listed specified offences in violation of the laws and customs of war. It took note of the atrocities committed on the territory of the Central Powers against their own nationals such as the genocide of the

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<sup>53</sup> M. Cherif Bassiouni, *ICC Ratification and National Implementing Legislation*, International Association of Penal Law (AIDP), 13 Quarter, (1:44), 1999, p. 10.

Armenians by the Turks and the crimes of the Austrian troops against its Italian minority, as violations of the laws of humanity.

However, the United States of America had a different policy. The belief of the U.S. President Woodrow Wilson was that any judicial prosecution of the German Kaiser would create the undesirable precedent of victor's justice, would do irreparable harm to the proposed League of Nations, and would boost the resentment among the Germans in such a way that could easily drive them towards communism. Consequently, the U.S. representatives objected to the phrase "laws and principles of humanity" arguing that those principles as included in the report were not a sufficiently reliable standard of conduct, and at the end no mention was made of the Kaiser's responsibility for initiating an aggressive war. Therefore, the Treaty of Versailles indicted the German Sovereign not for war crimes but for "a supreme offence against international morality and the sanctity of treaties."<sup>54</sup> Besides having no roots in international legal doctrine at the time, while the charge against the Kaiser was vague and did not mention his responsibility for initiating an aggressive war. The Allies failed to put Wilhelm II on the stand as he had found asylum in Holland, and the Dutch refused to extradite him on the grounds that his crimes were of a political character, since it was within the prerogatives of the head of the state to declare war.

To make things even worse, in effect no German citizen was punished for war crimes, although Articles 227-230 of the Treaty of Versailles provided for punishing war criminals. According to the provision of Article 228, the German government recognized the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war.<sup>55</sup> When the European Allies<sup>56</sup> requested the surrender of 854 persons accused for such crimes the received pressure from the German government and reduced the numbers drastically to 45 individuals, and won approval to put them on a trial before the German Supreme Court in Leipzig in 1921. Not only was this decision against to the Treaty of Versailles,

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<sup>54</sup> Treaty of Versailles, June 28, 1919, article 227.

<sup>55</sup> Treaty of Versailles, June 28, 1919, article 228.

<sup>56</sup> The U.S. because of an isolationist Congress had withdrawn from European politics after the war and therefore did not participate further in any war crimes procedure.



but the consequent trials proved to be a fiasco: The ones convicted were not made to serve their sentences, the British wishing to strengthen the German government let the matter fade away, and the French and the Belgians began trying hundreds of the accused Germans *in absentia* after they had withdrawn their observers from Leipzig.

Similarly the Allies showed no interest in pursuing war criminals in Austria, Hungary, Bulgaria, or Turkey.<sup>57</sup> The Armenian genocide and the mistreatment of British prisoners by the Turks resulted in the conviction of only Turkish officers by a Turkish military tribunal in 1919. The Allies failed to establish the criminality of the massacres,<sup>58</sup> and a political solution was given in 1923 with the Treaty of Lausanne granting amnesty to the perpetrators. Likewise, efforts for a limitation of armaments at the five-power Washington Conference of 1922 failed. Following Locarno security pact in 1920, the 1925 Geneva Protocol was established against the use of poison gas, the 1930 London Treaty for the limitation of naval armaments was signed, and the 1928 Treaty of Paris came into force and sought to outlaw war itself. Though inspiring in intent this multiplicity of international agreements proved to be hollow in practice in the years that followed.

Contrary to the aftermath of the First World War, that of the Second World War saw an explosion of war crimes trials in both Europe and Far East. Interestingly enough, except for the provisions relating to poison gas and submarines, the declared and generally accepted laws of war were the same with the provisions embodied in the Hague and Geneva conventions. Nonetheless, in 1945, public and official attitudes towards the laws of war had undergone a tremendous change. The horrific atrocities committed by the Axis military under the state direction made this time the victors of the war to abandon their First World War practice. The Allies could not have accepted once more that war criminals would be prosecuted and punished by their own national courts. That attempt had been already proven futile.

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<sup>57</sup> With the exception of Yugoslavia, which pressed for the punishment of war criminals from Bulgaria.

## B. THE NUREMBERG AND TOKYO INTERNATIONAL MILITARY TRIBUNALS

The International Military Tribunal at Nuremberg was an occupation court set up by the Allies,<sup>59</sup> to whom Nazi Germany had unconditionally surrendered thus giving them the right to exercise sovereign legislative power,<sup>60</sup> after the end of the Second World War. It had four judges; one for each of the allied powers fighting in Europe; Great Britain, France, the Soviet Union, and the U.S.. It further affirmed the right of the Allies to legislate for the occupied territories as recognized by the civilized world; it was a process driven by the U.S. since the Moscow Declaration.<sup>61</sup> The choice was between having a fair trial to deter future generations, and between summary executions of those who committed unprecedented atrocities. Moreover, a big trial would concentrate worldwide attention whereas a scattering of small trials would have carried little or no weight at all in marshalling public opinion.

It has to be distinguished from the rest of the tribunals implementing Control Council Law No. 10, which are usually referred to as “Military Tribunals” of various nations e.g., the “U.S. Military Tribunal sitting at Nuremberg, as opposed to the International Military Tribunal at Nuremberg, or Nuremberg Tribunal. Although small in number of defendants, compared to the rest of the Military Tribunals of the various nations, “was and has remained the most striking and important trial of them all, and that is why it has become known as ‘Nuremberg’- a name which conjures up the moral and legal issues raised by applying judicial methods to challenged wartime acts.”<sup>62</sup>

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<sup>58</sup> The term genocide had not yet been used but that what the Armenian massacres were.

<sup>59</sup> Great Britain, France, the Soviet Union, and the U.S. acting in the interests of all nations.

<sup>60</sup> *Trials of German Major War Criminals*, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22 (H.M. Stationary Office, 1950), 411 at 433; International Military Tribunal (Nuremberg), Judgment and Sentences, (1947) 41 *AJIL* 172 at 216.

<sup>61</sup> On October 30, 1943 President Franklin Roosevelt, Prime Minister Winston Churchill, and Soviet Premier Joseph Stalin signed the Moscow Declaration, which stated that upon cessation of conflict, the Allies would prosecute the Nazi war criminals. However, there was not a common desire for their judgment and punishment. The British advocated the summary execution of the major war criminals, the Soviets wanted to send to the firing squad fifty thousand Nazis, and the Americans were in favor of an international tribunal. Ultimately, the Major Allied Powers adopted Stimson’s plan, proposed by the U.S., and named after the U.S. Secretary of War Henry Stimson, and adopted the solution of an international military tribunal. See Taylor, *The Anatomy of the Nuremberg Trials*, p. 29-30.

<sup>62</sup> Taylor, *The Anatomy of the Nuremberg Trials*, p. 626.

The legal basis for the Nuremberg Tribunal was afforded by the London Charter of August 8, 1945. The Charter formulated three categories of international law crimes, namely crimes against peace, war crimes, and finally crimes against humanity. The Tribunal itself accepted the criminal responsibility of the defendants, reasoning that crimes against international law “are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>63</sup> The answer to the question of what kind of international law was to be enforced, and who was to interpret it, appears to be of a political nature. As the U.S. Representative to the International Conference on the Military trials stated in 1945, “we will declare what international law is....”<sup>64</sup>

The Nuremberg Tribunal considered its task to be one of interpretation and product of the law introduced by its Charter as “decisive and binding upon the Tribunal.”<sup>65</sup> Regarding the framework of the applicable law, and to the accusations of “victors justice” under retrospective legislation, or the defiance of the principle *nullum crimen, nulla poena sine lege*,<sup>66</sup> the International Military Tribunal stated that,

In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished...<sup>67</sup>

The lack of codification in international positive law required from the Tribunal sometimes to treat law in accordance with its perspective. Explicitly, for the offences of war crimes applied, *inter alia*, the 1907 Hague Convention and the 1929 Geneva

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<sup>63</sup> *Trials of German Major War Criminals*, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, Part 22 (H.M. Stationary Office, 1950), 411 at 433; International Military Tribunal (Nuremberg), Judgment and Sentences, (1947) *41 AJIL* 172 at 222.

<sup>64</sup> Robert H. Jackson, “Report of Robert H. Jackson United States Representative to the International Conference on Military Trials,” Minutes of the Conference Session, July 29, 1945,” *State Department Publication 3080* (1949), 97, 99.

<sup>65</sup> *Ibid.*, p.443-444.

<sup>66</sup> “There is no crime committed, and therefore no punishment for that without a pre-existing law providing for that.” The rule of law requires that not only the crime, but also the punishment must be defined in advance of crime commission.

<sup>67</sup> *Ibid.*, p. 217-218.

Conventions, and it was very careful for the Allies not to be accused of *tu quoque*<sup>68</sup> evidence. Crimes against humanity, such as the atrocities committed by Germans against nationals of occupied territories, or allied Axis territories, or even against German nationals were new. This category of crimes was formulated in view of German behavior toward German Jews.<sup>69</sup> Persecution of the offenders was covered by the concepts of crimes against peace or war crimes. The concept of the crime against peace was novel too, developed from the Anglo American world. It was covered by combining charges for waging war and the methods of warfare used by the Axis.

Twenty-four major Nazi war criminals were put on the stand in the Nuremberg Tribunal, leaving the prosecution of the minor ones to the states where they had committed their crimes. One of the defendants was declared unfit to stand trial and another committed suicide. The trials lasted eleven months, and a total of twelve defendants were sentenced to death (one of them was Martin Bormann, who was tried in absentia), three were acquitted and the rest received prison terms.

The other military tribunal, the International Military Tribunal for the Far East, or simply Tokyo Tribunal, was a natural and unavoidable consequence of the Nuremberg Tribunal.<sup>70</sup> After the war, the Supreme Allied Commander, General Douglas MacArthur, who also appointed the eleven judges, created it.

As a matter of fact only little inclination existed in high American circles to bring Japanese leaders before a Court charging them with the crime against peace. One wish did exist in American military and political circles, and that was to revenge the attack on Pearl Harbor...For the United States, Pearl Harbor was the symbol of Japanese guile, if not of Japanese criminality. For this attack without declaration of war the responsible leaders should be punished exemplarily. That was the opinion of General Douglas MacArthur, as he told me personally.<sup>71</sup>

Although the Tokyo Tribunal was intrinsically based on Pearl Harbor, since the precedent of Nuremberg had already been set, it was impossible to ignore Nuremberg. Hence, it followed as analogous reasoning and was modeled from the Nuremberg

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<sup>68</sup> Meaning, "if I am guilty, so are you," e.g. the Soviets could be accused of aggression with the invasion of Finland, Poland, and the Baltic, the British and the U.S. for the massive bombings of Dresden and Tokyo, etc.

<sup>69</sup> In the Tokyo Tribunal the defendants were accused of mass-annihilation policy towards China and the white population of Asia.

<sup>70</sup> M. Cherif Bassiouni et al, *A treatise in International Criminal Law*, Vol. 1, p.596.

<sup>71</sup> Statement by Bert V.A. Röling, Judge, IMTFE. Op.cit. p.597.

Tribunal, proclaiming its Charter in January 1946, and convened on May 3, 1946. Japanese war crimes suspects were classified as 'A,' 'B,' or 'C.' The 'A' suspects were charged with crimes against peace, and were the ones that were prosecuted by the Tokyo Tribunal, the 'B' with conventional war crimes, and the 'C' with crimes against humanity. The Tokyo Tribunal prosecuted twenty-five defendants, two of whom died during the trial, and one was declared mentally unfit to stand trial. The rest of the suspects ('B' and 'C' class) were tried before military courts in various states. It received the same criticism as the Nuremberg Tribunal namely, as "victor's justice," e.g., Japan was not permitted to accuse the U.S. for the use of the atomic weapons dropped in its soil, or the Soviets for the violation of the neutrality agreement of April 13, 1941.

All of the crime categories used in both tribunals "were vulnerable in the light of strict legality principles as elaborated in conventional constitutional laws of the civilized world."<sup>72</sup> In accordance with the Civil Law countries tradition, international law at that time had to be derived from a body of codes or statutes.<sup>73</sup> Furthermore, at the time of the London Charter, waging a war of aggression had no parallel in conventional criminal codes. Hence, if judged by conventional conceptions of criminal justice projected at the international level,<sup>74</sup> the legal basis for some of the crimes at the tribunals was questionable. However, as both of the International Military Tribunals had proven, international law reflects the moral judgments of the international community, and it evolves like the Common Law of the Anglo-American tradition. It is not contractual, referable to a *lex scripta* of definite and certain content, as the Civil Law countries would presume. Additionally, the justice given by these tribunals is justified in the light of their exceptionality. The crimes committed, and the intentional involvement of the states of Germany and Japan, were unparalleled in contemporary history. Legislative action addressing this situation had not occurred before the events.

Another important concern is the jurisdictional issue, which must be carefully looked upon with respect to the historical experience after the First World War. Given the

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<sup>72</sup>Ibid., p.26.

<sup>73</sup> Judges resorted to their own national jurisdictions to deal with the issue of duress for which there was no guidance in international law.

<sup>74</sup> In the *Dachau Concentration Camp* case, the U.S. prosecution relied on principles of U.S. criminal law.

fact that the trials after the First World War ended up to be a mockery, and to the fact that the German and Japanese penal codes were never amended to condone the atrocities of the war era, there was a significant danger to replicate the previous to the Second World War events. The political reasoning behind the tribunals that has been provided above clearly demonstrated that this could not have happened again.

So the International Military Tribunal began and finished, with general approval and little criticism from the world public. There were no charges that the defendants were being railroaded, the disclosures of Nazi atrocities were appalling, and the judges appeared to be fair and humane men. Thus the Tribunal accomplished what it had been established for. The world public was satisfied...In short, the International Military Tribunal was a success.<sup>75</sup>

The judgments in Nuremberg and Tokyo were a turning point in crystallizing and clarifying international law. They were not flawless, but under the conditions of that time, they presented the best possible civilized solution. Their errors and mistakes were instructive for the future. But their greatness is hidden in the new, unique and revolutionary concepts adopted. With the new rules of responsibility set by the IMTs, the old arguments invoked in order to paralyze the effectiveness of punishment based on traditional legal concepts<sup>76</sup> or on the internal criminal law of the Civil Law countries, have been overcome and the Nuremberg principles have been since part of the international law. It is a mistake to judge the revolutionary character of these Transnational Juridical Bodies by the laws that they overcame or even abolished. It would more prudent to judge them by their value for the future.

### **C. THE PRINCIPLES OF THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG**

If the International Military Tribunals were necessary, the question of what were their results, and how well they were utilized, not only by the victors and the defeated actors, but for the whole of mankind has to be answered with the principles set by these Transnational Juridical Bodies in mind.

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<sup>75</sup> Taylor, *The Anatomy of the Nuremberg Trials*, p. 635.

<sup>76</sup> The non-responsibility of the head of a state or those acting under orders, the no retroactivity of criminal laws, the non existence of a convention on the declaration of war, etc.

Indeed, it takes a long time to arrive at a system of legal provisions, especially at the international level. Therefore, the principles set by the International Military Tribunals having proved themselves resistant to time, are of paramount importance. They were unanimously adopted by the U.N. General Assembly Resolution 95(1) on December 11, 1946, and further accepted by the U.N. General Assembly on December 12, 1959. These principles, although they do not represent a systemic means of applying international juridical power, they address armed conflict issues as criminal conduct. The seven principles set, are as follows:

***“Principle I.*** Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefore and liable for punishment.

***Principle II.*** The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.

***Principle III.*** The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.

***Principle IV.*** The fact that a person acted pursuant to order of his government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.

***Principle V.*** Any person charged with a crime under international law has the right to a fair trial on the facts and law.

***Principle VI.*** The crimes hereafter set out are punishable as crimes under international law:

a. *Crimes against Peace:*

1. Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;
2. Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (1).

b. *War crimes:* namely, violations of the laws or customs of war. Such violations shall include, but not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. *Crimes against humanity:* namely, murder, extermination, enslavement, deportation, and other inhumane acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried out in execution of or in connection with any crime against peace or any war crime.

**Principle VII.** Complicity in the commission of a crime against peace, a war crime or a crime against humanity, as set forth in Principle VI, is a crime under international law.”<sup>77</sup>

The Nuremberg principles, with the passage of time, have had a profound impact, not only on international criminal jurisprudence, but also in establishing international security, and contributing to civil-military relations worldwide, as part of positive and contemporary international law.

The jurisprudence from the above principles is now included in Article 16 of the International Law Commission’s (ILC) Draft Code of Crimes Against the Peace and Security of Mankind of 1996. Aggression, in accordance to the Draft Code Article is described, as an act by “an individual who, as leader or organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State, shall be responsible for a crime of aggression.”<sup>78</sup> With regards to the elements of aggression as an international crime,

“What is clear is that omission can amount to an *actus reus* of this crime. The US Military Tribunal in the High Command case held that, in certain circumstances, omission or inaction could incur criminal liability of the accused like ‘active participation’. This happens in the following situation:

‘If..., after the policy to initiate and wage aggressive wars was formulated, a defendant came into possession of knowledge that the invasions and wars to be waged were aggressive and unlawful, then he will be criminally responsible if he, being on the policy level, could have influenced such policy and failed so.’

### **Mens Rea**

The requisite mental elements for the crimes of aggression are intent plus knowledge. In the *High Command* case, the US Military Tribunal stated that those guilty of this offence must have:

‘actual knowledge that an aggressive war is being indented and that if launched it will be an aggressive war. It requires in addition that the possessor of such knowledge, after he acquires it shall be in a position to shape or influence the policy that brings about its initiation or its continuance after its initiation, either by furthering, or by hindering or preventing it. If then does the former, he becomes criminally responsible; if he does the latter to the extent of his ability, then his action shows the lack of criminal intent with respect to such policy...’<sup>79</sup>

Not just any individual can be subject to prosecution under this charge. It has to be one of the individuals specified in the Nuremberg or Tokyo Charters, because a

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<sup>77</sup> (1950) ii *Yearbook of the ILC* 374-8. From Kriangsak Kittischaisaree, *International Criminal Law*, p. 20-21.

<sup>78</sup> UN Doc. A/CN.4/L.532 of 8 July 1996. Kriangsak Kittischaisaree, *International Criminal Law*, p. 224.



boundary line had to be drawn between the simple soldier and the supreme commander or the dictator. As it was ruled in the *High Command* case in Nuremberg, in the cases of *Muto*, and *Tojo* in Tokyo, it is not the rank that is of importance in this case, but the individual's ability to shape or influence policy, and it has to be proved on a case-by-case base. In order for the individual on a policy level not to be accused under this charge, he has to withdraw once he becomes fully aware of the conspiracy to wage an aggressive war, or of the aggressive war that is already being waged.<sup>80</sup> Nevertheless, the Nuremberg and Tokyo Tribunals did not limit their consideration of liability in terms of conspiracy to the charge of crimes against humanity and war crimes.

The term "crimes against humanity" was first used technically during the Nuremberg and Tokyo justice. Even more, in Principle VI the sub-category of "other inhumane acts" is included, so there will be no legal negligence in this particular crime that could be exploited by the imagination and creativity of criminals against humanity. This led to the examination and condemn of such crimes by the U.N. General Assembly on December 11, 1946, and by the ILC. They have reached the status of international crimes as part of international customary law and their perpetrators are given individual criminal responsibility. Moreover, the elements of crimes against humanity continued to be developed in the domestic courts of the world, and from the two U.N. *ad hoc* tribunals, ICTR and ICTY, until today. Now, it is a rule of customary international law that this kind of crimes needs not to be linked to international armed conflict as required during Nuremberg and Tokyo.

Regarding war crimes the contribution of Nuremberg and Tokyo is of no less importance. Their Charters regarded as war crimes those committed during international armed conflicts, i.e. if it is between two or more states, and had to be committed in the occupied territories. Hence, they had to be crimes; they had to be linked to an armed conflict itself; they had to be committed in the occupied territories-if they were committed in state territory or annexed territories they were crimes against humanity. The class of perpetrators was this time expanded. Civilians and not only military were convicted for this category of crimes, such as Hirota, the former minister of Japan

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<sup>79</sup> Kriangsak Kittichaisaree, *International Criminal Law*, p. 220-221.

<sup>80</sup> Ibid, p.224.

convicted for war crimes during the “Rape of Nanking.” It is true that the elements of this crime have evolved with time. However, the judgments in the post Second World War tribunals, the developments in international human rights law, and regional Transnational Juridical Institutions, such as the ECHR, had found significant guidance in the rulings of Nuremberg and Tokyo.<sup>81</sup> Hence, soldiers, members of the government, party officials and administrators, judges and prosecutors, doctors and nurses, concentration camp inmates, executioners were found guilty in the post-Second World War trials, under the Nuremberg reasoning.

Today no doubt exists as to the liability of the military commander who explicitly or implicitly gives permission to commit war crimes. In the Tokyo Tribunal the question of liability included the establishment of responsibility for omission in such crimes. The acknowledgement of such responsibilities has invaluable significance stimulated in marked degree the concern of high military and civil authorities for the maintaining international law. This was even more elaborate with regards to the terms of participation; the Tokyo Tribunal held responsible individuals on the basis of their de facto position to the conduct of war by the Japanese, although they had no formal powers of command.<sup>82</sup>

On the other hand, following superior orders was no longer a defense for the soldiers that they believe that by committing war crimes or atrocities are doing their duty. If that were the case the head of states issuing decrees and orders would be the only ones responsible. Only if the soldier, although aware of the illegality of the superior’s orders, had no choice, the element of moral choice is relevant and he could plead duress.

Furthermore, the principles established by the International Military Tribunals have been incorporated in many legal systems, and they have influenced the U.N. Charter. In many countries laws or regulations related to war crimes have been enacted, while most of these countries are part of one or more of the relevant Conventions. In other countries the Nuremberg principles can be found in the provisions of general

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<sup>81</sup> E.g. the *Medical* case in Nuremberg which laid down ten principles to satisfy moral, ethical, legal concepts for conducting medical or scientific experiments, and the *Krupp* case in Nuremberg regarding the seizure of property.

<sup>82</sup> Such is the case of General Akira Muto, Chief of Staff to General Yamashita in the Philippines.

criminal law. Moreover, in many instances war criminals were judged, although under domestic criminal law provisions, certainly in the light of the Nuremberg principles, e.g. the *Eichmann* case by the District Court of Jerusalem in 1961, and the case of *Klaus Barbie* in France.

Until today the application of international rules of war remains generally determined by the nations concerned, except in the comparatively few occasions that the United Nations intervenes. This intervention is most of the times by acting as a referee therefore, it is most of the times arguable if the nature of a war is aggressive or not. Additionally, not all the times legal systems adhered to the principles set. In the case of crimes committed or sponsored by a state like genocide or crimes against humanity, impunity at the national level is the usual outcome. Amnesty as a political means to promote national unity and reconciliation without justice being done first, is a reality in South Africa.

These do not negate the importance of the International Military Tribunals. They were novelties in their time, they caused drastic developments and achievements within international law, they have contributed to worldwide peace and security by influencing inter governmental and non governmental organizations such as the U.N. and the Red Cross respectively, and appealing to the hearts and minds of the public opinion worldwide. Moreover, they contributed to civil-military relations by creating a momentum for obedience into international law to both sides military and civilian authorities, and by putting the armed forces under democratic civilian control by creating a powerful precedence. This momentum was kept alive with the ICTR and ICTY that prove that international justice still is needed because it works. It remains to be seen if the novelty of the new millennium, the International Criminal Court will reinforce their success.

#### **D. THE IMPORTANCE OF THE INTERNATIONAL MILITARY TRIBUNALS WITHIN THE FRAMEWORK OF INTERNATIONAL SECURITY AND CIVIL-MILITARY RELATIONS.**

Certainly it was not, and it is not anticipated that the rulings of the International Military Tribunals would or will put an end to aggressive wars or war crimes. It is

doubtful whether an explicit definition of aggression satisfying the principle of legality could ever be agreed upon. However, their significance in shaping public opinion and motivating policy-makers worldwide in declaring an international ban on waging such acts was, and still is, of utmost importance. Their influence on the United Nations is obvious: The world consent as set in the Charter of the United Nations states as its first and foremost purpose in Article 1 (1) is to suppress the acts of aggression or other breaches of the peace in order to maintain international peace and security. Even if the definition of aggression is not provided, and it is left intentionally to the Security Council to define, the International Military Tribunals were the first bodies addressing aggressiveness. They did not define aggression per se, but they distinguished between aggressive actions and aggressive wars, declared or not, and the individuals for aggressive actions were charged with a conspiracy to commit a crime against peace. Thus, they could provide the reasoning that can lead to the definition. On December 14, 1974 their spirit culminated in the definition of aggression by consensus from U.N. General Assembly's Resolution 3314.

In accordance to these principles, when North Korea attacked South Korea in 1950 it was a clear case of aggression, and the United Nations became actively engaged. The U.N. Security Council was able to authorize military forces and assistance to a unified command under the U.S. in order to restore international peace and security. A war of aggression was stopped, the North Koreans and their Chinese allies were driven back to the original border, and a truce was declared. A few years later the United Nations were involved again in denouncing the British-Israel military incursion into the Suez Canal, when the Egyptians tried to obtain full control of the latter. Another case of stopping aggression was the 1990s crisis in the Persian Gulf when Iraq invaded Kuwait. The United Nations again adopted the view that international law forbids aggressive wars and thus cannot tolerate them. Within this reasoning the U.S. and the rest of the coalition forces interfered, liberated Kuwait, and provided stability in the region.<sup>83</sup> There is no doubt that in all these cases other factors were also involved, but the International Military Tribunals ban on aggressive wars was so intended and the moral, legal, and

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<sup>83</sup> The U.S. President at the time, in trying to gain support for the military operations against Iraq, relied principally on the argument that gross and dangerous violations of international law such as aggression cannot and will not be tolerated.

political validity of it so important that it has been repetitively brought up in the interests of international security and peace.

Moreover, the years that followed after the International Military Tribunals were effected by confrontation between the West and the Soviet Union, but as time passed, both of the Cold War adversaries could fight a war with weapons of mass destruction. Starting an atomic war would definitely be a war of aggression.

Nuremberg and Tokyo are indelible precedents: in a period when the technical development of weaponry (atomic weapons) is conducive to the banishment of war, such precedents clear the way, they have the power of the beaten path. It can be maintained that it is a criminal act to commence a war in the atomic age.<sup>84</sup>

Likewise, during the postwar period the U.N. has passed special Resolutions and initiated several conventions the meaning and legal interpretation of which rely upon the Nuremberg principles, e.g. the 1948 Genocide Convention, and the 1948 U.N. Convention Against Torture. Nuremberg and Tokyo justice led in conjunction with the post-Nuremberg codification of war crimes law, to the U.N. Security Council Resolutions that established the two U.N. *ad hoc* tribunals for Yugoslavia and Rwanda, and provided the guideline for the Charter of the International Criminal Court. Their spirit runs in the human rights provisions contained in the Universal Declaration of Human Rights adopted on 10 December 1948, by the U.N. General Assembly.

Although the above present the merits of the case, loopholes also exist. The Vietnam War is questioned worldwide as a war of aggression, and acts committed in that war fall within the prohibited classifications of warfare as laid down in Nuremberg and Tokyo. Furthermore, when the Soviet Union invaded and occupied Afghanistan, the aggression was plain but the U.N. did not take up arms against the Soviets. The United States of America only marginally helped the Afghanis; the danger of a global thermo-nuclear war was more important than the aggression of the Soviets.

Outside the U.N., the principles of the International Military Tribunal contributed in the development of the laws of warfare in terms of the four 1949 Geneva Conventions (the four Red Cross Conventions), and the 1977 Additional Protocols I and II. They

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<sup>84</sup> B. V.A. Röling et al, The Tokyo Judgment: The International Tribunal for the Far East, (I.M.T.F.E.) 29 April 1946-12 November 1948, APA-University Press Amsterdam BV, 1977, Vol. I, p. XII.

created expectations from the world's public opinion, and they still gather their attention. They provided guidance for the creation of other mechanisms for implementing human rights. In addition to the U.N., regional structures now operate in Europe, the Americas, and Africa with the European system being the most fully developed of those structures and its ECHR.

The importance of the International Military Tribunals to the future of Germany and Japan with the West, and their significance in terms of international security can be displayed even further by an article of Otto Kranzbuehler, one of the defense lawyers, as narrated by Telford Taylor:

If agreement from a quite different source is desired, consider an article on Nuremberg by Otto Kranzbuehler, who, on other subjects, has differed with me often and forcefully: It was clear that after the obvious crimes committed under Hitler's leadership, particularly the annihilation process against the Jews, something had to happen to discharge the tension between victors and vanquished...It was the United States who insisted that expiation must be sought and found by way of a judicial trial. The International Military Tribunal proceedings did, in my opinion, perform this function. It was the painful starting point for building the relations that exist today [1965] between Germany and her Western Allies.<sup>85</sup>

The importance of the Nuremberg and Tokyo judgments and principles within the framework of civil-military relations would be shortsighted to be considered only with regards to Japan and Germany. Their significance exceeds territorial limits; it belongs to the whole civilized world. Their principles were codified as international law and influenced societies by serving as symbols; states and state behavior through their constitution, legislation, and appealing to the public; armed forces through education, changing traditions, training in new missions, and forging a cult of obedience in international law.

Conceptually, it is easier to examine the impact in Germany, Japan, and the United States of America for reasons of immediate application and convenience. It is not a coincidence in the literature that the conception of civilian supremacy as at the cornerstone of civil-military relations which only emerged in the early 1950s, with Samuel Huntington's *"The Soldier and the State: The Theory and Politics of Civil-Military Relations"* studying exactly Germany, Japan and the United States of America.

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<sup>85</sup> Taylor, *The Anatomy of the Nuremberg Trials*, p. 626.

German civil-military relations have been through three phases. Phase I was when the aristocratic army of Frederic the Great was destroyed by Napoleon, Phase II when the professional army created by Scchaarnhorst and Gneisenau was destroyed by the Nazis, and Phase III started after the end of the Second World War.<sup>86</sup> The Nazi party before the Second World War infiltrated the professional officer corps. That altered its fundamental character as an autonomous institution.<sup>87</sup> Hitler started to intervene in the preparation of the military plans as early as 1938. When the war started to go badly he started making decisions on the tactical level also. Although many of the German armed forces during the war had participated in atrocities and war crimes, there were also many that objected and resisted. The military were victims of Nazism; this is a reality but not an excuse in legal terms. Its destruction with the millions of deaths and casualties created strong anti-war and anti-military sentiments in the post-war Germany. It is remarkable how bad civil-military relations due to a horrible totalitarian regime made the military as an institution to fail:

Born of enlightened reform, it [the military] had been motivated by the ideals of integrity, service, competence, duty, and loyalty. Whatever the uses to which it was put, in and of itself it was a force for reason, realism, and peace.<sup>88</sup>

This “use” was absolutely horrific: Many of the enemies of National Socialism were killed in measured and methodical fashion by the German military and their killing squads, and the troops were required and permitted to vent their anger against non-combatants. These actions had definitely left a “stain” on the armed forces worldwide; Germany included.

The pattern of civil-military relations emerged differently in the Federal Republic of Germany. If it were to be left to its own, the Federal Republic of Germany would surely not have acquired an army for many years. The rise of the Cold War created the need for rearmament, and Nuremberg justice provided the principles. The condemnation under Nuremberg justice of those who committed horrific crimes unparalleled to mankind

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<sup>86</sup> This section is drawing heavily from S. Huntington, *The Soldier and the State: The theory and Politics of Civil-Military Relations*, p. 123.

<sup>87</sup> For a description of the methods see S. Huntington, *The Soldier and the State: The theory and Politics of Civil-Military Relations*, p. 119-121.

<sup>88</sup> Ibid., p. 122-123.

by that time inspired lawmakers, politicians, and the public. Nuremberg served not only as an institutional tool but also as a myth, tradition, and symbol for the armed forces, the state, and the society. The historical memory that dominated the founding of the Federal Republic of Germany, its political culture, and its social attitude had all the marks of the Military Tribunal on them.

Under these conditions, the Federal Republic joined into a system of collective security; while on the same time this ensured that German citizens could not be forced into military service against their wishes. This was mainly done with the concept of *Innere Führung* or Inner Order, which embodied the basic concept of the internal order of the military and the integration of the latter in the society and the state. Under this concept an emerging democratic Bundestag would achieve absolute control over the armed forces. At first,

The Bundestag insisted upon sharing in the control of the military forces. ...More significantly, the German government's defense adviser indicated that the 'inner order' of the army and that all soldiers would go through a special 'citizenship course.' 'Democracy can be defended only by democrats,' Herr Blank was quoted as saying, 'and freedom only by those who experience it themselves.'<sup>89</sup>

The founders of the West German armed forces, "promised that the future army would represent something fundamentally new in contrast to the era before 1945, and that it would avoid the political and social abuses of the past."<sup>90</sup> This new *Innere Führung* demanded and promoted moral leadership, how this leadership is practiced by the superiors, and particularly with regards to military conduct in stressful conditions.

Under *Innere Führung*, the military become citizens in uniform. The citizen is to experience his military service not as a contradiction to or denial of his rights and freedoms, but as a fundamental condition to secure dignity, justice, freedom, democracy and peace. Hence, the soldier is trained to the highest standards while still remaining politically conscious and responsible, acknowledging democratic rights and protecting the values that were set forth with the IMTs. The concept is not static, since society evolves through time however it has very strong foundations, essentially guarantying

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<sup>89</sup> Ibid., p. 123.

<sup>90</sup> Donald Abenheim, *Reforging the Iron Cross: The Search for Tradition in the West German Armed*



respect for human rights and for democratic political authority. Although many aspects of it are taught since it has been codified in the constitution and in relevant laws, each member of the armed forces must be able to experience the application of its principles in his daily military service.<sup>91</sup> This integration of the military to the society reflects to Huntington's "subjective control;" the military are integrated into the state and the society becoming the mirror of the latter.

In Germany the constitutional and legal order was a determining factor for the control of the military. "The image of the citizen in uniform combines the military with democracy and the system of the constitutional state."<sup>92</sup> From the very beginning of the new state its Constitution, the Basic Law, and the Laws of the Laenders included the spirit of the two-post war IMTs, and the public's rejection and revulsion of the armed forces.<sup>93</sup> The Basic Law for the Federal Republic of Germany as promulgated by the Parliamentary Council on May 23, 1949 and amended by the Unification Treaty in 1990 provides that the executive authority is bound by law and justice and particularly, by the basic rights of all citizens. Therefore, it includes provisions for the basic human rights (Articles 1-18), accepts international arbitration under article 24, bans the preparation of a war of aggression under Article 25, and provides for checks and balances between the executive, legislative and judiciary authorities. It is important to notice that the basic right of protection of human dignity, laid down in Article 1 is not subject to any restrictions, and may not be infringed by any emergency legislation measures or regulations concerning the legal status of the soldiers, due to its fundamental importance within the human rights provisions.<sup>94</sup> Armed forces are established and given powers under the

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*Forces*, Princeton, 1988, p. 6.

<sup>91</sup> Central Service Regulation, *supra*, p.11-16; unpublished paper *Innere Führung*, *supra*, p7-8. Chistian Schulze, *A Comparative Study of the German and British Defense Legislations*, Institute for Foreign and Comparative Law, UNISA, 1994, Op. cit. p.8.

<sup>92</sup> Unpublished information on the German armed forces, obtained from the German Ministry of Defense in Bonn. Chistian Schulze, *A Comparative Study of the German and British Defense Legislations*, Op. cit. p.6.

Available [online] at: <http://www.iss.co.za/Pubs/Other/DefenceLegislation/Chap4.html>, 7/2/2002.

<sup>93</sup> The creators of the Basic Law believed that, for the foreseeable future, the security of western Germany would rest within the occupying powers. See Donald Abenheim, *Reforging the Iron Cross: The Search for Tradition in the West German Armed Forces*, p. 41.

<sup>94</sup> For that reason the regulations concerning the legal status of the soldier laid down in the Legal Status of Military Personnel Act (*Soldatengesetz-SoldG*) stipulates that a military order, which infringes the

provisions of Article 87a. Even in a state of defiance, the Basic Law includes the provisions of international law under Article 115a. Moreover, in terms of controlling the armed forces, and in order to maintain that the constitutional and legal provisions are preserved and obeyed by the military, the Basic Law includes significant provisions. Military criminal courts are under the Federal Minister of Justice (Article 96), a parliamentary commission of defense monitors the military behavior and approves the budget (Article 45a), a defense commissioner is appointed to safeguard the basic rights of the citizen-soldier (Article 45b), and the command authority is given to civilians (Article 65a as it was amended in 1968).

The changes in non-constitutional legislation can be also observed in different articles of the German Penal Code. In accordance to Section 5, Section 80, and Section 80a of the latter, the preparation of a war of aggression is considered a crime even if such an act has committed outside of Germany.<sup>95</sup> Failure to report such crimes is also punishable under Section 138. Section 6 and 220a provide similarly against genocide.<sup>96</sup> Section 100 provides for peace-endangering relationships. Chapter Six under Section 113 provides for resistance to an unlawful act even if the perpetrator mistakenly assumes that the official act, e.g. an order is unlawful.<sup>97</sup> Finally, under Section 81(2) 2 it is high treason to change the constitutional order based on the Basic Law,<sup>98</sup> and under Sections 86a and 89 the armed forces are protected by anti constitutional influence, especially Nazi party propaganda.<sup>99</sup>

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human dignity of a soldier may be ignored, and the soldier will not commit an act of disobedience by ignoring such an order.

<sup>95</sup> Punished with life imprisonment or for not less than ten years. Title One: Crimes against Peace; Special Part, Chapter One: Crimes against Peace, High Treason and Endangering the Democratic Rule of Law, German Penal Code.

<sup>96</sup> Punished with life imprisonment. Chapter Sixteen: Crimes against life, Special Part, German Penal Code.

<sup>97</sup> Chapter Six: Resistance to State Authority, Special Part, German Penal Code.

<sup>98</sup> Punished with life imprisonment or for not less than ten years. Title Two: High Treason; Special Part, Chapter One: Crimes against Peace, High Treason and Endangering the Democratic Rule of Law, German Penal Code.

<sup>99</sup> Punished with up to five years imprisonment Title Three: Endangering the Democratic Rule of Law; Special Part, Chapter One: Crimes against Peace, High Treason and Endangering the Democratic Rule of Law, German Penal Code.

Likewise, the regulations concerning the legal status of a soldier contained in the Legal Status of Military Personnel Act in Section 6, guarantee the same citizen rights to the soldier as in every citizen. Hence, combined with the respective constitutional provisions the military personnel does not become a mere object of state action. “As a member of the armed forces and bound to the state in a special relationship of duty and loyalty, he enjoys the basic rights which he, at the same time, has a supreme duty to support and uphold.”<sup>100</sup> Similarly, the legal Status of Military Personnel Act provide for the duty of the military to “...support the basic democratic order of the Federal Republic of Germany and...defend its laws...demand obedience if the armed forces are to remain effective and the primacy of political control is to be preserved.”<sup>101</sup>

Furthermore, Nuremberg shaped public opinion for many years in terms of sensitivity to military misconduct, and this public behavior transformed into political action; the German military are founded on the principle of general defense duty. Hence, due to the frequent rotation of national service conscripts all tendencies and changes to the civil society are quickly transferred to the military; the military and the society are interlinked with the conscripts making the citizen-soldier an “inner” type of control, since the military actually mirror the society. The latter can be observed in the sporadic cases where German soldiers were engaging into physical abuses of their own, and the resultant decree of 1964 that described and maintained the tradition in the German military.<sup>102</sup> Likewise, the *Bundeswehr* did not accept individuals who identified themselves with the ideas of the Nazis or the *Waffen-SS*.<sup>103</sup>

For Japan the pattern of sustained military involvement to politics ended in 1945. Similarly to the German case, for eight years the only civil-military relations were between the local domestic authorities and the occupation forces. Even when Japan was no more occupied, it had no armed forces. Foreign policies, and in particular the U.S.

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<sup>100</sup> Chistian Schulze, *A Comparative Study of the German and British Defense Legislations*, p.2.  
Available [online] at: <http://www.iss.co.za/Pubs/Other/DefenceLegislation/Chap4.html>, 7/2/2002.

<sup>101</sup> Ibid., p.2.

<sup>102</sup> E.g. the soldier must be obedient but he has also to answer to his consciousness and he must resist against injustice and criminality, the requirement for respect of human rights, etc.

<sup>103</sup> Donald Abenheim, *Reforging the Iron Cross: The Search for Tradition in the West German Armed*

foreign policy influenced in Japan's transition to democracy, and initiated a "democratic transition by installation."<sup>104</sup> However, the Japanese civilian authorities were aware of the political character and the involvement the military had before the war, and the disastrous consequences this could have for the future if it was to be repeated.

The most important step towards this direction influenced by the IMTs was the replacement of the former Great Japanese Imperial Constitution with the 1946 Constitution, which is the "supreme law of the nation."<sup>105</sup> For analytical purposes is important to notice that the 1946 Constitution was enacted while the IMTs were going on; the spirit of the latter is obvious throughout the former: Among the fundamental principles of the Constitution lay pacifism and basic human rights. In particular human rights are protected under Chapter III. In accordance with them the peoples' rights to life, liberty, and the pursuit of happiness shall "...be the supreme consideration in legislation and in other governmental affairs."<sup>106</sup>

Likewise, both its preamble and its Article 9 of Chapter II substantiate the idea of pacifism in a form of renunciation of war; prohibition of aggression; and non-retention of military arms. The preamble explicitly resolves that "never again shall we be visited with the horrors of war through the action of government," affirms that the authority of the latter "is derived from the people," and makes clear its fundamental presupposition that the consent of the governed is "a universal principle of mankind."<sup>107</sup> The Constitution's Article 9, due to its uniqueness and its importance on roles and missions of the armed forces deserves to be quoted in full:

Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

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*Forces*, p. 210-213.

<sup>104</sup> Juan Linz and Alfred Stepan, *Problems of Democratic transition and Consolidation*, Johns Hopkins University Press, 1996, p.73.

<sup>105</sup> Article 98, paragraph 1, Japanese Constitution of 1946.

<sup>106</sup> Art. 11, Chapter III, Japanese Constitution of 1946.

<sup>107</sup> Preamble. Japanese Constitution of 1946.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.<sup>108</sup>

Not ignoring that the fact the Japanese military potential had to be minimized had a lot to do with Japan being occupied, it is also important not to ignore that the Constitution was widely embraced by the Japanese society, which had suffered so much during the Second World War. Furthermore, the Japanese society felt that they were free from any war responsibility, since their wartime leaders paid the price in the wake of the Tokyo tribunal, and they still stand firm in support of the pacifist provisions of the Constitution.<sup>109</sup>

However, the beginning of the Cold War, and the Korean War in particular, gave birth to the Japanese Defense Agency (JDA) and the Japanese Self Defense Force (JSDF) under the Self Defense Forces Law of 1954. They both comprise the same defense organization but JDA is used as an administrative organization controlling the JSDF and subordinate to the prime minister (Article 66 of the Constitution). Under the legal and constitutional restrictions they are relatively small, presenting the minimum force required for self-defense.<sup>110</sup> The Self-Defense Law of 1954, upholding strictly the constitutional lines provides for a unique military system. “All SDF personnel are technically civilians: those in uniform are classified as special civil servants and are subordinate to ordinary civil servants who run the Defense Agency.”<sup>111</sup>

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<sup>108</sup> Art. 9, Chapter II, Japanese Constitution of 1946.

<sup>109</sup> The public support to Article 9 can be seen in numerous polls. See among others:

John Spragens Jr., *Japan's military now regaining its lost respect*, Dateline-Japan, p.2.

Available [online] at: [http://www.enigmamaterial.com/hn\\_34/hn\\_34\\_07.html](http://www.enigmamaterial.com/hn_34/hn_34_07.html), 6/24/2002,

Jason Gottlieb, *Representative Democracy and Military Policy in Postwar Japan: The Role of Public Opinion*, A.M. Degree Harvard University, January 16, 1996. Available [online] at:

<http://www.asahi-net.org.jp/~zj5j-gttl/thesis.htm>, 7/1/2002,

Yugo Suzuki, *Should the Japanese Constitution be amended? Attitudes of the secular and Christian press toward Article 9*, Japan Christian Review, (147:153), 59, 1993.

<sup>110</sup> *Government View on Purport of Article 9 of Constitution*, Japan Defense Agency, Government of Japan. Available [online] at:

[http://www.jda.jp/e/policy/f\\_work/frame12\\_.htm](http://www.jda.jp/e/policy/f_work/frame12_.htm), 7/8/2002.

<sup>111</sup> *Japan Defense Agency, Japan Self Defense Force*, FAS: Intelligence Resource Program.

Available [online] at: <http://www.fas.org/irp/world/japan/jda.htm>, 7/8/2002.

Moreover, under Japan's Constitution strict civilian control is maintained over every aspect of the Japanese military. High-ranking military officers are not allowed to be involved in the government policymaking process, might that be as a cabinet or National Defense Council member. The Chairman of the Joint Staff Council (JSC) cannot report directly to the Prime Minister, nor can a military representative testify before the parliament or its committees. Likewise the JSDF's structure precludes the concentration of power of the pre 1945 general staffs.

To be sure, the prewar constitution contained a fault, that military authorities could conduct military operations outside political control; the government could not participate in the military command. Presently, in contrast, the JSDF is totally under civilian control. This is an entirely different arrangement than its predecessor had. Today, the prime minister, on behalf of the cabinet, holds the authority for supreme command and control of the JSDF. Therefore, there is virtually no possibility that militarism will revive in Japan...<sup>112</sup>

Likewise, constitutional constraints prevent the SDF from possessing weapons systems that are considered purely offensive. In addition to the state's policy of never acquiring, manufacturing, or using weapons of mass destruction such as nuclear weapons, the JSDF are not allowed to acquire weaponry with force-projection capabilities, such as aircraft carriers, and air-refueling planes.<sup>113</sup>

Therefore, due to the constitutional restrictions in terms of a collective defense agreement, and to the limitations of the JDF, the United States of America in 1960, under the Treaty of Mutual Cooperation and Security, undertook the main burden of Japan's security. The treaty was based on Article 9 of Japan's Constitution: Article 5 of the treaty states that "Each Party recognizes that an armed attack against either Party in the territories under the administration of Japan would be dangerous to its own peace and security and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."<sup>114</sup>

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<sup>112</sup> Captain Katsutoshi Kawano Japan Maritime Self-Defense Force, *Japan's Military Role: Alliance Recommendations for the Twenty-First Century*, p.7. Available [online] at: <http://www.nwc.navy.mil/press/Review/1998/autumn/art1-a98.htm>, 6/10/2002.

<sup>113</sup> William Heinrich et al, *United Nations Peace-Keeping Operations: A guide to Japanese politics*, United Nations University Press, 1999, p. 87.

<sup>114</sup> Takai Susumu, *Japan's Contribution to UN Peacekeeping*, Social Science Japan No 6 February 1996, p.2. Available [online] at: <http://www.web.iss.u-tokyo.ac.jp/newslet/SSJ6/takai.html>, 7/8/2002.

After the end of the Cold War, Japan contributed towards peacekeeping operations (PKOs) under the Peace Keeping Law of 1992, and passed several amendments in its legislation, the so called Guidelines legislation, in order to support U.S. forces in situations in areas surrounding Japan that have an important influence on the latter's peace and security. However, the restrictions imposed due to constitutional anti-war provisions made the JSDF subject to strict guidelines e.g., they cannot be deployed in missions that may entail the use of force; Japan cannot send peacekeepers in an area where a cease-fire has not yet been firmly established between conflicting parties.<sup>115</sup>

Further issues make civil-military relations more interesting and complex. There is no military secrets law, and all offences from the SDF personnel are adjudicated under normal procedures by civil courts. Japan lacks emergency legislations, i.e., wartime laws because they are under Article 9, a violation of the Constitution and therefore Japan cannot ratify and implement the Geneva Conventions. Since war is outlawed as a means to resolve disputes, supposition of wartime legislation would be a violation of the Constitution. As a result the JSDF became a peculiar armed force that disincorporates the idea of war crime. Hence, issues like unlawful conduct of JSDF servicemembers would hold the latter responsible for acts that are not stipulated in the national legislation. However, after the terrorist attack in the United States of America, on September 11, 2001 the Japanese government is in the progress of submitting new legislation during 2002 although such an attempt will be very difficult to be approved by the Diet due to the abovementioned Constitutional constraints.

The importance of the two ITMs can also be seen in their impact on the West, and especially in the United States of America the major protagonist in both military tribunals. It must be noticed from the beginning that in the United States of America citizenship is an important parameter of both the society and the military. The armed forces, the people, and the government establish a special relationship.<sup>116</sup> People's

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<sup>115</sup> For a complete list of the restrictions, see William Heinrich et al, *United Nations Peace-Keeping Operations: A guide to Japanese politics*, p. 45-78 and Takai Susumu, *Japan's Contribution to UN Peacekeeping*, p. 2-3.

<sup>116</sup> For the military influence in American society and vice versa see Samuel Huntington, *The Soldier and the State*, p. 354-373.

attitudes reflect upon the military and the policymakers. To the American public the IMTs serve as symbols against aggression, genocide, and horrific crimes. The punishment of those responsible for the Holocaust, for the “final solution” brings Nuremberg in mind. Many political decisions regarding the use of the military have either been strongly criticized, Vietnam to be the strongest case, or applauded, e.g., the Gulf War. Similarly the “body bag” syndrome, as the latter had been addressed by various polls, has been many times the decisive factor for the policymakers in order not to deploy the armed forces however; when it comes to crimes dealt at Nuremberg the American public has been overwhelmingly supportive.<sup>117</sup> The moral conviction that crimes like genocide bring into public mind legitimized domestically, both towards the military and the policymakers, the interventions in Bosnia and Kosovo.

Moreover, when the Nuremberg principles were codified as international law they became easily accommodated under the U.S. Constitution<sup>118</sup> and U.S. municipal law.<sup>119</sup> The Geneva Conventions of 1949, created in the spirit of the IMTs, passed as federal law on May 5, 1950 through the system of the Uniform Code of Military Justice. The latter provides for prosecution of military personnel suspected of having committed violations of the law of war.<sup>120</sup> Likewise, The *Law of Land Warfare*, paragraph 509 makes it explicit that obedience to an unlawful order is no defense against a charge of war crimes.

Furthermore, credit has to be given to the tribunals for making with their jurisprudence military officers to appreciate the complexities of national policy, and the political thinking in which they would be engaged. Objective civilian control was

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<sup>117</sup> Kenneth J. Campbell, *Genocide and the Global Village*, Palgrave, 2001, p.50-53. In a similar manner, Colonel James P. Terry USMC, *The Panama Intervention*, Naval War Review, Vol.39, 1990,p.13: Law in support of policy concluding remarks: “If we have learned one lesson from Panama, is that legal criteria and political criteria are related. Where the use of military force can be defended as necessary and proposional under the canons of international law, the American people will support its use as a proper exercise of national power.”

<sup>118</sup> Art. I§8 U.S. Const., Cl. 10: “Congress shall have the power (t)o define and punishes piracies and felonies committed on the high seas, and offences against the law of nations...”

<sup>119</sup> In *Re Paquete Habana* 175 U.S. 677, “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are dully represented for their determination.” In *The Nereide*, 9 Cr. 388 (1815) similarly, “...in the absence of an act of congress the Court is bound by the law of nations which is a part of the law of the land.” Chief Justice Mashall in delivering the court’s opinion. J. Holmes Armstead, Jr, *The United States vs. William Calley: An Opportunity Missed*, op. cit. footnote 7, p.206.

<sup>120</sup> 10 U.S.C.§ 818 (UCMJ Art. 18) Jurisdiction of General Court-Martial: “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.”



occasionally criticized in terms of unlawful conduct. As Samuel Huntington states when he addresses the issue of objective civilian control and non-military thinking in the post war U.S.,

American military officers themselves in the postwar decade did not miss the relevance of the Nuremberg 'higher loyalty philosophy to their own behavior. General MacArthur echoed many of the American civilian critics of the German generals when he denounced the 'new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of government rather than to the country and its Constitution which they are sworn to defend.' More explicitly, another American officer defended what he agreed was the 'insubordination' of Captain Crommelin in the 1949 B-36 controversy on the grounds that:

The decisions of the Nuremberg International Military Tribunal were in large based on the tenet that the professional military defendants should have followed their consciences and not the orders of Hitler. There are, then occasions when the refusal of a military man to comply is not insubordinate, but is positively his duty.<sup>121</sup>

Criticism addressed to the policy makers rose after Vietnam in the terms of the use of proportional force, and dysfunctional policies. Telford Taylor among others,<sup>122</sup> states that,

Some twenty-five years ago, widespread controversy arose over the meaning of Nuremberg vis-à-vis the Vietnam War. Secretary of State Dean Rusk invoked Nuremberg to justify American Military intervention, but thousands of young men contented, to the contrary, that under the Nuremberg principles they were legally bound not to participate in what they regarded as the United States' aggressive war.<sup>123</sup>

Likewise he argues that "The sad story of America's venture in Vietnam is that the military means rapidly submerged the political ends,"<sup>124</sup> and that "Somehow we failed ourselves to learn the lessons we undertook to teach at Nuremberg, and that failure is today's American tragedy."<sup>125</sup> Today it can be argued that these were indeed lessons learned by the West, both the policy makers and the military. Proportionality, and the elimination of collateral damage is the current *modus operandi* of the United States of America and NATO,<sup>126</sup> as the Final Report to the ICTY Prosecutor by the Committee

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<sup>121</sup> Samuel Huntington, *The Soldier and the State*, p.353-354.

<sup>122</sup> Bernard Brodie, *War and Politics* (1973); John Mueller, *War, Presidents and Public Opinion* (1973); Michael Walzer, *Just and Unjust wars* (1977); Leslie Gelb and Richard Betts, *The Irony of Vietnam*. Telford Taylor was an American prosecutor at Nuremberg. Cited from Kenneth J. Campbell, *Genocide and the Global Village*, p.39-40.

<sup>123</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials: a personal memoir*, p.4.

<sup>124</sup> Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle Books, 1970, p.189.

<sup>125</sup> *Ibid*, p.207.

<sup>126</sup> *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, NWP 9A,

Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia has shown.<sup>127</sup>

Finally, it is important to notice another aspect of the Nuremberg principles, this time within the new roles and missions of the military. During the Cold War era the armed forces were focused in fighting a global war, the Third World War. Both East and West endorsed the Nuremberg principles nevertheless; each interpreted the latter under a radically different political and socioeconomic vision.<sup>128</sup> This changed dramatically after the collapse of the Soviet block in 1989. Then democracy was accepted as the cornerstone of international security. It is no co-incidence that after the 1991 war in the Persian Gulf it was reported to the United States Congress that “[d]ecisions were impacted by legal considerations at every level, the law of war proved invaluable in the decision making process.”<sup>129</sup> When the latter started to be threatened in different places in the world, the armed forces started being used in low-intensity conflicts, peacekeeping, peacemaking, and in Military Operations Other Than War (MOOTW) or under the current American terminology Stability Operations. To accomplish these new missions they had to be exposed to international law as the latter had been developed and codified by that time. New roles and missions simply required new training in the “train as you fight” doctrine.<sup>130</sup> Hence, today international law is taught in major military academies throughout the United States of America as in their equivalent in the Western World,<sup>131</sup>

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Washington D.C., 1989. See also the debate over intervention, from Richard N. Haas, *Intervention: The use of American Military Force in the post-Cold War World*, Revised edition, Brookings Institution Press, 1999, p.1-18.

<sup>127</sup> Available [online] at: <http://www.un.org/icty/pressreal/nato061300.htm>, 6/27/2002.

<sup>128</sup> De-colonization strengthened even more the Cold War tensions, and therefore the U.N. Security Council was ideologically prevented from enforcing prohibitions against aggression and genocide. The Third World countries were strongly opposed to any international interference within their borders.

<sup>129</sup> *Conduct of the Persian Gulf War*, Department of Defense report to the Congress. Cited from Colonel K.W. Watkin, Deputy Legal Adviser, Office of the legal Adviser to the Department of National Defense and the Canadian Forces, National Defense Headquarters Canada, *Integrating International Humanitarian Law into Military Training*, EAPC Workshop on International Humanitarian Law and Multinational Forces, London November 20-21, 2000. Available [online] at:

[http://www.isn.ethz.ch/pfpdc/documents/2000/10-00\\_London/watkin.htm](http://www.isn.ethz.ch/pfpdc/documents/2000/10-00_London/watkin.htm), 6/28/2002.

<sup>130</sup> *Joint Task Force Commander's Handbook for Peace Operations*, Joint Warfighting Center, 16 June 1997, and Joint Pub 3-07, Military Operations Other Than War (MOOTW).

<sup>131</sup> Laws of war are taught in a semester-long course at West Point. Similarly in the Naval Academy, the Royal Air Force, and the Canadian armed forces. See Gary Solis (Laws of War instructor at West Point), *Expert Analysis*, Crimes of War. Available [online] at:

and rules of engagement (ROE) are designed to obey the international legal provisions.<sup>132</sup> Officers that are under the Professional Military Education (PME) program in the U.S. armed forces, together with the international officers from different nations that are participating in the program, are taught international law, the law of armed conflict, and the Charter of the United Nations.<sup>133</sup>

## E. CONCLUSIONS

The history of mankind shows that polities develop judicial institutions for mediating, resolving, and imposing settlements. However, the mere existence of the latter cannot create conditions and impose settlements to conflicts. Their importance lays in the fact that without them conditions like peace, order, security, lawfulness and justice cannot occur even if imposed by force. Force not only is unsatisfactory means to obtain such results but also often creates more harm than good. That also applies with respect to the international community.

The two IMTs at Nuremberg and Tokyo were institutions that did not rely simply on force. They have developed new legal norms and standards of behavior, responsibility, and accountability that have advanced international law, state and military conduct, and provided legal bases and reasoning for other social, and political institutions both in the national and in the international level.

They served as a turning pointing crystallizing and clarifying norms and in enforcing penalties for the perpetrators. The IMTs had not only influenced the post war trials of war criminals, but they have influenced national legislations, and international organizations with the United Nations being the predominant one. With the passage of time their principles have proved resistant to time, notwithstanding eventual

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<http://www.crimesofwar.org/expert/solis.html>, 7/1/2002.

<sup>132</sup> For example, ROE will clarify what targets are lawful however the situation may be so flux that an air force targeter must have fully understood and practiced the concepts related to lawful and unlawful targets before assign missions that could cause unjustified collateral civilian damage.

<sup>133</sup> *Joint Maritime Operations Block 2.1 and 2.2*, College of Continuing Education, Naval War College, Newport Road Island, 2000. *Naval Warfare Publication 1-14M*, United States Navy, etc. Similar attempts are made in many countries, e.g. Switzerland, and Canada. In Canada Likewise in Canada there is an “Operations and Law” module at the Canadian Command and Staff College, in the Advanced Military Studies Course, and in The National Security Studies Course training officers from the rank of Major to the rank of General. See Colonel K.W. Watkin, Deputy Legal Adviser, Office of the legal Adviser to the Department of National Defense and the Canadian Forces, National Defense Headquarters Canada, *Integrating International Humanitarian Law into Military Training*.

shortcomings during the Cold War and the post-Cold War era. They created a powerful precedence an aggression and obedience to their norms, and a momentum for international security and stability through agreements and declarations in regional and international level. The Korean War, the Suez Canal, and the Persian Gulf are mere examples of the merits of the case.

Furthermore, their moral legacy serves as a symbol, appealing to the hearts and minds of the people worldwide. They have shaped the opinions of policy makers for many years and they have contributed in building democratic states in Germany and Japan, aside from their universal significance, by influencing domestic legislation and leading to a democratic governance. The armed forces, reeducated in the preservation of peace and the respect to international law, accept civilian supremacy but without following superior orders when committing atrocities as a defense. In the same spirit the civilian authorities realized that there is a limit in the use of their own armed forces; aggression is not acceptable any more; genocide is no longer a choice for civilization and no government authority should lead their military towards such actions. Within that reasoning they have influenced the dynamics of civil-military relations through crafting citizenship, providing legal codifications, that turn on defined roles and missions for the armed forces, and guidelines for education and training in the post Cold War era.

In Germany civil-military relations emerged in the concept of Inner Order integrating the military in the society and the state by making the soldier a citizen first. To achieve the latter constitution and legal formulas were introduced.<sup>134</sup> However, the importance of Nuremberg lies within the heart of the citizen-soldier concept. One of the basic elements of the Inner Order is political education of the German soldier. The citizen-soldier is not just a servant of the German state, but above all a democrat defending not just his country but also the values that Western democracy stands for; he is a mirror of a German democratic society. This form of “subjective constitutional control” was highly influenced by the Nuremberg principles as has been highlighted in the provisions of the Basic Law, and the Penal Code, and the Legal Status of Military

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<sup>134</sup> As mentioned legal and political bodies were introduced with the Basic Law, to monitor and enforce compliance, e.g. military criminal courts under the Federal Minister of Justice, a parliamentary commission of defense, and a defense commissioner appointed to safeguard the basic rights of the citizen-soldier. Furthermore, the command authority was given to civilians.

Personnel Act. The needs for German rearmament could not have proceeded without such a legal change. The Cold War needs for rearmament of the Federal Republic of Germany required democratic citizens in arms as much as they required a democratic state, not just another German armed force in another German state.

In Japan, civil-military relations were even more influenced by the IMTs spirit. In fact, the Japanese went even further with the adoption of the 1946 Constitution. The latter declared pacifism and renounced aggression and war. Hence, relative to Japan's economic growth, the JSDF have limited capabilities, and they are restricted to only self-defense missions and peacekeeping operations always under the strict constitutional guidelines. The military are not considered to be military *per se*, since war is against the Constitution, but special civil servants subordinate to civilian control through JDA. More peculiarities rise from the fact that war is not an issue, therefore there is not any emergency legislation hence, Japan cannot ratify the Geneva Conventions.

In the United States the Nuremberg principles, accepted now as part of U.S. national law, guided policy makers in the use of their military because of the acceptance of these principles from the American public. In fact, when the U.S. military were used against these principles there has been great public disapproval and condemnation of the deployment.

The Nuremberg principles provided also for education and training in new missions and roles after the end of the Cold War. Proportionality and the elimination of civilian collateral damage is a guiding factor in the U.S. and NATO campaigns. Furthermore, the military education is changing. Military academies and military staff colleges include international law as the latter embodied the Nuremberg principles in their classes, since there is a contemporary need to adapt to the concept of MOOTW or Stability Operations.

## **V. THE UNITED NATIONS *AD HOC* TRIBUNALS**

### **A. HISTORICAL BACKGROUND**

#### **1. The International Criminal Tribunal for the Former Yugoslavia (ICTY)**

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first war crimes tribunal since Nuremberg and Tokyo. It was the first time also for the Europeans confronting allegations and evidence of genocide since the Second World War. Hence, the U.N. Security Council using its authority under Chapter VI of the U.N. Charter set up the ICTY as a subsidiary organ to restore and maintain peace in the former Yugoslavia. If compared with the Nuremberg and Tokyo tribunals, which were multinational in nature but representing only part of the world's community, this was indeed the first truly international tribunal to be established by the U.N. to enforce international human rights law.

Ironically enough, the nationalism involved in the events in the former Yugoslavia and the subsequent atrocities have their roots in the Second World War.

In April 1941, Nazi Germany invaded Yugoslavia, creating a puppet state called the Independent State of Croatia. Croatian Nationalists, known as the Ustashi, under the direction of the Nazis initiated a violent campaign to rid Yugoslavia of all persons of Serbian origin and create a homogenous nation of Croatians. With the defeat of Nazi Germany, the Croatian Army was forced to surrender and Yugoslavia came under the rule of Josip Tito. Despite being a half-Croat, half-Slovenian, he considered himself above all a communist who envisioned that national and ethnic rivalries, like class distinctions, would eventually fade from everyone's collective memory. Under his firm leadership, the Federated People's Republic of Yugoslavia enjoyed a relatively long period of unification and peace. After his death in 1980, he was replaced by a collective leadership that failed to provide a unifying force needed to maintain the Republic. It was thus easy, in the depressed economic climate of Yugoslavia in the late 1980s, for leaders like Slobotan Milosevic of Serbia and Franjo Tudjman of Croatia to reopen the wounds of not only World War II, but of previous centuries.<sup>135</sup>

During the summer of 1991 Croatia and Slovenia declared independence but without providing for the security of the population of Serbian nationality that lived within their borders. This declaration led to a civil war between the Croatian majority and the Serbian minority which was supported, by the Yugoslav Federal Army, at the time the

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<sup>135</sup> Joseph A. Ellenbecker, *From Nuremberg to The Hague: A Contrasting Study of War Crimes Tribunals*, Masters Thesis, Naval Postgraduate School, Monterey, CA, 1998, p.6-7.

third largest in Europe. This led the Croatian majority to the loss of almost one-third of their territory and eventually to the deployment of the U.N. Protection Force (UNPROFOR) as a peacekeeping force. Nevertheless, when Bosnia-Herzegovina on October 15, 1991 proclaimed its sovereignty, the Bosnian Serbs were ready to resort to violence to prevent the succession. Subsequently they boycotted the independence referendum of March 1, 1992 and organized a militia with the blessings of the Yugoslav Federal Army. On April 6, 1992 the Europeans recognized Bosnia-Herzegovina as a sovereign state, and the U.S. followed the next day. The Bosnian Serbs responded immediately by forcing hundreds of thousands of non Serbs to flee assisted by forty-five thousand regular troops of the Yugoslav Federal Army and shelled the major Muslim population centers. The U.N. Security Council under resolution 771, which called for substantial information about human rights violations, and a Special Rapporteur was appointed to investigate the information collected. Furthermore, under Resolution 780 a Commission of Experts was established to examine and analyze the information submitted, and to provide its conclusions to the Secretary General. Hence, on May 25, 1993, under Resolution 808, the Security Council adopted the Statute of the International Tribunal for the Former Yugoslavia (ICTY) and under Resolution 827 the ICTY was unanimously approved.

While the wars were going on in Slovenia, Croatia, Bosnia and Herzegovina Kosovo was in a state of unrest with the Kosovo Albanians of the Kosovo Liberation Army (KLA, or UCK) fighting the Serbian police forces from 1996 on. The Serbian forces responded with a campaign of shelling of predominantly Kosovo Albanian towns and villages, widespread destruction of property and expulsion of the civilian population from territories in Kosovo where KLA was active.<sup>136</sup> On March 24, 1999 the intensifying conflict led the North Atlantic Treaty Organization (NATO) to begin *Operation Allied Force* launching air strikes against the former Yugoslavia. On May 22, 1999 the ICTY issued a significant indictment against a sitting head of State, Slobotan Milosevic, and several high-ranking Serbian officials which was sent to the Federal Ministry of Justice

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<sup>136</sup> Sonja Boelaert-Suominen, *The International Criminal Tribunal for the former Yugoslavia and the Kosovo conflict*, International Review of the Red Cross, No. 837, (217:252), March 31, 2000.

of the Federal Republic of Yugoslavia, to all U.N. members, and to Switzerland accompanied with the respective arrest warrants. The indictment alleges that between January 1 and May 1999 forces under their control persecuted the Albanian Kosovars on political, racial, and religious grounds. On June 9, 1999, and after showing its overwhelming superiority, NATO suspended its operations and signed a Military Technical Agreement with the Republic of Serbia requiring the Serbian military and its allies to withdraw from Kosovo. An international security force, the KFOR was established which immediately started to demilitarize the KLA. Likewise, on June 12, 1999 the Security Council established an international civil presence in Kosovo in the form of the United Nations Interim Administration Mission in Kosovo (UNMIK). Since then Kosovo has undergone obvious changes, and the Kosovar Albanians do not suffer from Serbian repression. However, the international community is now concerned with the refugees that fled to neighboring countries and the Albanian nationalism that is spreading in the region accompanied with revenge attacks.

The ICTY is based in The Hague, Netherlands. It consists of three organs, namely the three Trial Chambers and an Appeals Chamber, the Office of the Prosecutor, and a Registry. It is composed of sixteen permanent independent judges and a maximum of nine *ad litem* independent judges, elected by the General Assembly. It is not subject to any national laws and it has concurrent jurisdiction and primacy over national courts to prosecute individuals for serious violations of international human rights law committed in the territory of the former Yugoslavia since 1991. However, it co-exists in prosecuting these crimes vis-à-vis national courts; it lacks exclusive jurisdiction over crimes included in its mandate. By its set up, the ICTY aims in deterring future violations of international criminal law, establishing a historical record of atrocities, bringing justice in terms of fair trials, stop the ethnic violence and contributing to reconciliation, and serving as a model enforcement mechanism for the future.



## 2. The International Criminal Tribunal for Rwanda (ICTR)

Rwanda is a small nation densely populated. It is a former Belgian colony, located in central Africa consisting before the genocide, of about seven million inhabitants.<sup>137</sup> In the precolonial era, three mutually interdependent groups, namely the Hutu, Tutsi, and Twa coexisted and showed no predisposition to war. During colonialism, the political and socio-economic organization was exploited by mainly the Belgians to divide the Rwandans into ranked, rigid, institutionalized ethnic groups, and the Tutsi minority was ruling the country. Likewise, the Hutu were systematically excluded from education and “the catholic schools which dominated the colonial education system, practiced open discrimination in favor of the Tutsi.”<sup>138</sup> Rwanda gained its independence from Belgium in 1962 after the growing demands of the Hutu majority, in what came to be known as the “Hutu Revolution” from 1959 to 1961.<sup>139</sup> The post-colonial governments reinforced the divisive policies of the past and they played on the interests and the fears of the masses.<sup>140</sup> Those governments were Hutu dominated. In their effort to take control of the new Rwandan state they started a reverse discrimination against the Tutsi minority, which became progressively more virulent in the 1980s. Hundreds of thousands of Tutsis fled to the neighboring countries. A Tutsi guerilla force established the Rwandan Patriotic Front (RPF), and its army, the Rwandan Patriotic Army (RPA) started fighting against the oppression. On August 4, 1993 in Arusha, Tanzania, Hutu President Juvenal Habyarimana and Tutsi military leaders signed the Arusha Accords. These were two protocols, which combined with earlier agreements, comprised a peace agreement in order to stop the violence. For implementing the peace accord, the U.N. Security Council established the U.N. Assistance Mission to Rwanda (UNAMIR) consisting of 2,500 U.N.

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<sup>137</sup> Elizabeth Neuffer, *The Key to my neighbor's house: Seeking Justice in Bosnia and Rwanda*, Picador USA, N.Y., 2001, p.84.

<sup>138</sup> Philip Gourevich, *We Wish to Inform You that Tomorrow We Will be Killed with our Families*, New York: Farrar Straus, 1996, p.57.

<sup>139</sup> Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda*, Cornell University Press, 2002, p.52.

<sup>140</sup> Namely, the Kayibanda and Habyarimana regimes. Hutu dominated Kayibanda's regime from the south, his home area, and it was under his regime that the Tutsi were highly excluded from the military, the civil service, and education. In 1973 Major General Juvenal Habyarimana, the army chief of staff, and a Hutu from the North, led a successful coup d' etat against Kayibanda's regime. The new regime also used the Tutsi as scapegoats for government failures, and it also organized periodic massacres of them.

troops. However, when President Habyarimana was murdered,<sup>141</sup> the Hutu militia, led by the Presidential Guard, began a systematic massacre of Tutsis, Hutu moderates, and UNAMIR soldiers.<sup>142</sup> Hutu killing resulted in the systemic and horrific<sup>143</sup> murder of hundreds of thousands of civilians. The reasons for the genocide can be found in the need for elites to remain in power, the fear of the peasants of losing land to the Tutsi returnees, concerns of physical security among the Hutu of Tutsi reprisal, the ethnic ranking, and the highly centralized Hutu state.<sup>144</sup> To all these Tutsi were the obstacles.

The genocide ended in June when the PRF took control of the major Rwandan centers. The results of the Rwandan genocide were the mass killing of eight hundred thousand Tutsis and moderate Hutus, the disintegration of the society, and almost two million refugees.

Very little about the Rwandan genocide is comprehensible. A Hutu elite came to believe that Hutu salvation necessitated Tutsi extermination. The Hutus enacted their conspiracy with startling efficiency. In one hundred days, between April 6 and July 19, 1994, they murdered roughly eight hundred thousand individuals. ...The Rwandan genocide, therefore, has the macabre distinction of exceeding the rate of killing attained during Holocaust. And unlike the Nazis, who used modern industrial technology to accomplish the most primitive of ends, the perpetrators of the Rwandan genocide employed primarily low-tech and physically demanding instruments of death that required an intimacy with their victims. The genocide was executed with a brutality and sadism that defy imagination. Eyewitnesses were in denial. They believed that the high-pitched screams they were hearing were wind gusts, that the pack of dogs at the roadside were feeding on animal remains and not dismembered corpses, that the smells enveloping them emanated from spoiled food and not decomposing bodies. One is reminded of Primo Levi's observation about the Holocaust: 'Things whose existence is not morally comprehensible cannot exist.'<sup>145</sup>

Although the neighboring states provided significant humanitarian assistance to the refugees, and major governmental and non-governmental organizations provided

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<sup>141</sup> On April 6, 1994, on his way back to Kigali, the Rwandan capital, missiles shot down his jet. It is debatable who fired the missiles.

<sup>142</sup> The soldiers were ten Belgians members of UNAMIR protecting the Rwandan Prime Minister. They were tortured, mutilated, and left in a pile in the Kigali hospital. This action led Belgium to withdraw its four hundred troops, since they considered themselves targeted due to the colonial legacy. When the genocide began, the only foreign troops in Rwanda were some 1,400 UNAMIR soldiers, but they were not authorized to use force in order to keep peace. After the killing of the U.N. soldiers and the withdrawal of Belgium, the remaining UNAMIR forces were kept in barracks.

<sup>143</sup> Although the government forces were equipped with modern weapons, there were cases like Kibuye where more of five thousand Tutsis were massacred in close quarters with primitive weapons, such as machetes.

<sup>144</sup> Jil D. Rutaremara, *Genocide in Rwanda: Towards a Theoretical Approach*, Masters Thesis, Naval Postgraduate School, Monterey, CA, March 2000, p.4-6.

<sup>145</sup> Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda*, p. 1.

supplies and medical aid, the response from the U.N. in terms of peacekeeping forces was minimal. The call of the former U.N. Secretary-General Boutros-Ghali for a force of five thousand U.N. peacekeepers did not find any response. Disagreements among the members of the Security Council resulted in the U.N. inability to prevent the genocide. The U.S., influenced mainly by the domestic impact by the American deaths in Somalia and the subsequent failure of operation on October 3, 1993, opposed the peacekeeping proposals. This had tremendous costs in lives in Rwanda, since the U.S. has always been the major contributor to the U.N. in terms of funding and troops. But it was not just the US. All the permanent members of the Security Council, by being such, accept the responsibility to defend against threats to their national security and also to international peace and security. The Great Powers however, disagreed for their own reasons. "Indeed, there seemed to be an almost inverse relationship between their power and their willingness to help."<sup>146</sup> France temporarily deployed troops unilaterally, and for its own political reasons and expectations. Because the French had been supportive to the Hutu government, they intervened to prevent Tutsi military from retaliating against Hutus. This French force however, resulted in saving the lives of tenths of thousands of fleeing Hutus.

Almost as inexplicable is the reaction of the international community. What sets the Rwandan genocide apart from all other genocides is that the international community could have intervened at relatively low cost before the effects were fully realized. A genocide convention enjoined states to do something. There were twenty-five hundred United Nations peacekeepers on the ground, and indeed, soon after the killing began, the UN's force commander, Canadian General Roméo Dallaire, pleaded for a well equipped battalion to stop the slaughter. Yet the UN immediately ordered its forces not to protect civilians. And, on April 21, it ordered that all but 270 troops be withdrawn.<sup>147</sup>

Once again mankind was not eager to intervene, and too late when it decided to do so. The U.N. in an attempt to make good on its past failings in Rwanda, responded to the latter's request<sup>148</sup>, and set up the International Criminal Tribunal for Rwanda (ICTR)

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<sup>146</sup> Ibid, p.171.

<sup>147</sup> Ibid, p.1-2.

<sup>148</sup> UN Doc. S/1994/115 of September 29, 1994. The Rwandan government wrote to the President of the Security Council calling for the earliest possible creation of the ICTR. However, Rwanda voted against Resolution 955 due to the tribunal's limited *ratione temporis*, and further considered that the ICTR's structure inadequate for the task given, that priority was not given to the crime of genocide, that capital punishment was excluded, that third countries would have power over the detainees but no genuine consultation with Rwanda is involved, and finally that the ICTR's seat is not in Rwanda. Despite its negative vote, Rwanda has always said that it will fully cooperate with the ICTR.

by the Security Council Resolution 955 on November 8, 1994. However late that was, it was of the moral, as well as legal obligations that the international community had towards the Rwandans in terms for justice and reconciliation. Likewise, it was the UN's obligation to its members and to their respective societies as they had been appalled once more with the horrific crimes committed.

The ICTR is based in Arusha, Tanzania as neutral territory and not in Rwanda, for reasons of justice and equity, and because Rwanda lacked any infrastructure for hosting the tribunal. Like ICTY it is not subject to any national laws, it co-exists in prosecuting these crimes vis-à-vis national courts, and it has concurrent jurisdiction and primacy over national courts over genocide, crimes against humanity, violations of the 1949 Geneva Conventions, and of its Additional Protocol II committed in the territory of Rwanda between January 1 and December 31, 1994. Like the ICTY, ICTR exercises jurisdiction over natural persons, but also lacks exclusive jurisdiction over crimes included in its mandate. It consists of three Trial Chambers, an Appeals Chamber, the Prosecutor and a Registry.

#### **B. SIMILARITIES AND DIFFERENCES BETWEEN THE U.N. *AD HOC* TRIBUNALS AND THE INTERNATIONAL MILITARY TRIBUNALS (IMTS) AT NUREMBERG AND TOKYO**

There are many similarities between the two ad hoc tribunals since ICTR was influenced in its set up by ICTY. However, there are also differences among them. As both represent the two active criminal International Juridical Bodies since no case has been presented to the International Criminal Court yet, it is necessary to have a closer look at them. Likewise, the comparison between the International Military Tribunals of Nuremberg and Tokyo will show the progress these bodies have made in a relatively short period of time. Their similarities and differences can be addressed by comparing their statutes and their pragmatic considerations under which they were established and functioned.

In summarizing the similarities of the ICTY and the ICTR it must be stated that they are both set up by the United Nations. Therefore, all U.N. member-states are obligated to cooperate with them. Likewise, they are both subsidiary organs of the U.N.

Security Council. They apply positive and customary international law, they are both not subjects to any national laws, and co-exist in prosecuting international crimes vis-à-vis national courts. However, they enjoy primacy over the national courts and may take over national investigations and proceedings at any stage if that proves to be in the interest of international justice. They prosecute only natural persons, not organizations, political parties, administrative entities, or other legal subjects. Their Prosecutor is an independent organ, and is the same for both tribunals. Their judges are elected by the U.N. General Assembly, on the basis of a short list of candidates selected by the Security Council. They have almost identical Rules of Procedure and Evidence. They currently have three Trial Chambers, and an Appeals Chamber. *Ad litem* judges support both ICTY and ICTR. Moreover, in order to ensure consistency in the application of law, they exchange judges and share the same President in the Appeals Chamber. Finally, the penalty imposed by the tribunals is limited to imprisonment; life imprisonment being the highest penalty imposed by them.

Their differences arise mainly from their establishment. The U.N. General Assembly also approved the ICTY, whereas the Security Council without further verification of the General Assembly set up of the ICTR. When the ICTY was prosecuting crimes for Bosnia, alleged crimes took place in Kosovo, and NATO intervened. Nothing like that happened in Rwanda, although small fights are regularly taking place. Furthermore, their jurisdiction differs. The ICTR has jurisdiction over grave breaches of the 1949 Geneva Conventions, violations of the laws or customs of war, genocide, crimes against humanity committed in the territory of the former Yugoslavia since 1991. The ICTR has jurisdiction over genocide, crimes against humanity, and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II committed between January 1 and December 31, 1994 by Rwandans in Rwanda and in the territory of the neighboring states and for non-Rwandans for those crimes committed in Rwanda. Hence the jurisdiction of the ICTR is limited in internal armed conflict only. Also, for the ICTY, the important issue is the commitment of crimes against humanity within an armed conflict. For the ICTR such crimes are linked with discriminatory intent, i.e., if they are committed on national, political, ethnic, racial, or religious grounds. This

is in addition to the other requirements in the Nuremberg Charter, Tokyo Charter, and the ICTY Statute.

With the adoption of the two U.N. *ad hoc* tribunals, comparisons between them and the post-Second World War IMTs became inevitable. They are all unique in establishment, and they share significant differences. The Allies established the ITMs in occupied territories, and they were military courts. The *ad hoc* tribunals were created by the United Nations and, although extraordinary, they have nothing to do with military courts. The ICTY and ICTR are truly multinational, and they are based on globally accepted legal precedents and principles. Hence, their legitimacy is not questioned as “victor’s justice,” contrary to the IMTs. However, the IMTs were novel, and the Nuremberg principles, are part of international law. Fifty years of reflection of these principles by the international community has given to the *ad hoc* tribunals the opportunity to have a stable legal base. This does not imply the lack of criticism; it just states the fact that the IMTs contributed significantly to the development, and the codification of international law. Hence in the *ad hoc* tribunals, there are no application of *ex post facto* laws and allegations of judicial partiality. The legitimacy of the ICTY and the ICTR is based on both conventional and rules of customary law that are beyond any doubt part of international customary law, rather than the rights of belligerents to enforce the laws of war. Likewise, lessons that were to be learned were really learned. Unlike the Allies at Nuremberg and Tokyo, the members of the Security Council recognize that they constitute a political entity therefore; they lack competence to sit in judgment of alleged perpetrators, hence the establishment of the independent judicial bodies for Yugoslavia and Rwanda. Furthermore, the ICTY and the ICTR do not allow trials *in absentia*, and they are both accountable to the defendants, who can appeal their judgments. Similarly to the IMTs heads of state, government officials, and persons acting in an official capacity cannot plea immunity however, they prosecute only natural persons, not organizations, political parties, groups, corporate entities or states, and they can impose only imprisonment. The number of the defendants to be tried from the ICTY and the ICTR is significantly different than the number of defendants in Nuremberg and Tokyo. With suspects numbering into thousands, the detainees are currently forty-three for the ICTY and sixty for the ICTR compared to the twenty-four for Nuremberg and

twenty-five for Tokyo. The required proceedings without loosing the essential fairness of the trial process for the ICTR will not be concluded before 2008<sup>149</sup> and before 2016<sup>150</sup> for the ICTY, contrary to the relevant speedy IMTs. Even so, the ability to obtain evidence is not the same with the relatively easy task the Allies had in the Second World War. Besides the lengthy documentation and records that the victors gathered from the German and Japanese authorities, but also their own sources in Yugoslavia and Rwanda things are different and the evidence is scarce. Moreover, the ability of the Allied military to obtain evidence was definitely better than that of the United Nations, and their legal staff due to the lack of control over areas where offences have been committed. Likewise, the *ad hoc* tribunals seem to suffer from a lack of sufficient financial support unlike the IMTs where budget constraints and limited resources were not an issue. Definitely the voluntary contributions that have been established by the U.N. General Assembly highlight the problem.

### **C. THE ICTY AND ICTR LEGAL STATUS AND JURISPRUDENCE**

Each International Juridical Body interprets the law in accordance with the instrument that created it. Hence, the ICTY and ICTR as such, their status and rules consist of a synthesis of the Civil Law systems and the Common Law systems. These tribunals are not bound by any past legal doctrines. They apply customary international law as it stands when the crime is committed. It is obvious that international law has much evolved since the end of the Second World War therefore, the notion of the offences are considered at the relevant times when they were committed and not when the notion of those crimes was being developed.

Having been established under Chapter VII of the U.N. Charter, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of

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<sup>149</sup> Ms Del Ponte, Prosecutor of the International Criminal Tribunal for Rwanda, *Press Conference in Arusha on December 6, 2001*. Available [online] at:

<http://www.ictr.org/wwwroot/ENGLISH/speeches/delpontepresconf021201.htm>, 6/17/2002.

<sup>150</sup> United Nations Press Release, Fifty-fifth General Assembly, Plenary, 20 November 2000, 68<sup>th</sup> Meeting (AM). This creates the unacceptable situation of detainees being deprived their freedom for several years before their fate is decided upon.

International Humanitarian Law Committed in the Territory of the Former Yugoslavia since January 1, 1991 or ICTY, functions in accordance with the provisions of its Statute. The Security Council Resolution 827 when adopted on May 25, 1993, and amended by the Resolutions 1166 on May 13, 1998, 1329 on November 30, 2000, and 1411 on May 17, 2002 established the ICTY Statute.

Similarly, having been established by the Security Council acting under Chapter VII of the U.N. Charter, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring States between January 1, 1994 and December 31, 1994 or ICTY functions in accordance with the provisions of its Statute. The ICTY Statute was established by Security Council Resolution 955 on November 8, 1994 and was amended on April 30, 1998 with Resolution 1165, with Resolution 1329 on November 30, 2000, with Resolution 1411 on May 17, 2002 and finally with Resolution 1431 on August 14, 2002.

It is important to note that although the ICTY and the ICTR Statute have been established by an international organization and are binding on states under Chapter VII of the U.N. Charter therefore they differ from treaties; their interpretation is essentially the same with the latter under customary international law. When there is no applicable treaty provision, general principles of international law may be used. If that also fails, “international courts must draw upon the general concepts and legal institutions common to all major legal systems of the world.”<sup>151</sup> Furthermore, they may also draw upon national law to fill possible omissions in their statute or customary international law.<sup>152</sup>

Both of the *ad hoc* tribunals have upheld themselves the legality of their establishment. In ICTY’s opinion, the Security Council was justified in the set up of the tribunal as a response to the threat to the peace in the territory of the former Yugoslavia,

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<sup>151</sup> *Fuundzija*, para. 178. ICTY, T. Ch. II. Cited in *Kittichaisaree, International Criminal Law*, 47. In this case itself the Trial Chamber found that most legal systems lack in uniformity in the criminalization of certain forced sexual acts as rape, and resorted to the general principles of international criminal law, i.e., the principle for respect of the human dignity.

<sup>152</sup> *Prosecutor v. Zoran Kupreskic and Others*, Case No. IT-95-16-T, ICTY T. Ch. II, 14 Jan. 2000, paras 539-40. Op. cit., 45.



and all UN states must observe the measures taken by the Security Council under Chapter VII.<sup>153</sup> Likewise, the legality of the ICTR has been upheld by itself, when the Trial Chamber noted that since Rwanda itself was the state that requested the establishment of the ICTR, and since the obligations of the U.N. Charter bound all the member states, the set up of the ad hoc tribunal could not have violated the state sovereignty of Rwanda or neighboring states. Moreover, since the internal conflict in Rwanda was a threat to international peace and security the U.N. Security council was justified to act under the U.N. Charter, specifically under Chapter VII. Nevertheless, it reasoned that Chapter VII was the legitimate source of its creation and that ICTR is obligated to provide fair trials by its Statute and its Rules of Procedure and Evidence.<sup>154</sup> Hence, it rejected the contention that the ICTR's creation violated the principle of *jus de non evocando*.<sup>155</sup>

With regards to interpretation of their statute, the ICTY in *Prosecutor v. Delalic et al.* ("*Celebici*") used three different rules of interpretation, namely the literal rule, the golden rule, and the mischief rule. Under the first, the judge interprets the rule as is in the statute, whereas under the second, which supplements the literal interpretation, the judge is to modify the grammatical sense of the word up to a certain degree, to avoid anomaly and contradiction that would lead to injustice. Under the third, the judge is asked to examine the legislative history of the statute in terms of the mischief that it intends to remedy. In other words, the social and political considerations that created the tribunals are taken into account but under strict construction, without filling omissions in the statutes that are not accidental; the tribunals do not have legislative authority.

The decisions and judgments of the tribunals have a particular significance in aligning the rules applicable in both international and non-international conflicts. According to the tribunals there is a common core of substantive international human rights law that is applicable to both of them. The ICTY Appeals chamber stated that

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<sup>153</sup> *Prosecutor vs. Dusko Tadic*, Case No. IT-94-1-AR72, ICTY App. Ch., Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995. Op. cit. 24.

<sup>154</sup> *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, ICTR T. Ch., Decision on Jurisdiction, 18 June 1997. Op. cit., 25.

<sup>155</sup> A principle under constitutional law in Civil Law systems that prohibits the creation of "extraordinary" or "special jurisdiction" courts for political offences during internal unrest without the guarantees of a fair trial.

Common Article 3 to the 1949 Geneva Conventions constitutes such a minimum,<sup>156</sup> and that the general essence of the rules and principles governing international armed conflicts apply also to internal armed conflicts. The ICTY further conformed the existence of that common core of rules, and further clarified the distinction between non-international armed conflict and situations of civil unrest or terrorism.<sup>157</sup> The tribunals also contributed further in the elaboration and development of rules applicable in internal armed conflicts:

Why protect civilians from belligerent violence, or even ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>158</sup>

In determining the character of the conflict in the former Yugoslavia the ICTY has generated significant jurisprudence. The Appeals Chambers decided, regarding the ICTY’s competence, that there were several distinct conflicts within the territory of the former Yugoslavia since 1991, and refused to accept them automatically as a single armed conflict since they had both internal and international aspects. Instead, it set a new test, the ‘overall control test’ in asserting the necessary link between an armed faction in a *prima facie* local conflict in the territory of a sovereign state and the military of another foreign nation, i.e. if one faction of the conflict is acting as an agent of another state which exerted ‘overall control’ over this faction, and left the Trial Chambers to decide whether the international nature was established in the cases that were brought to them.

The establishment of individual criminal responsibility for serious violations of international human rights law has been substantially advanced with the creation and the jurisprudence of these two bodies. Both the ICTY and the ICTR statutes provide for individual criminal responsibility in articles seven and four respectively. In terms of

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<sup>156</sup> *Prosecutor vs. Dusko Tadic*, Case No. IT-94-1-AR72, ICTY App. Ch., Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para 102.

<sup>157</sup> Cases of *Prosecutor v. Tadic*, and *Prosecutor v. Celebici* respectively.

<sup>158</sup> *Prosecutor vs. Dusko Tadic*, Case No. IT-94-1-AR72, ICTY App. Ch., Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995. Para. 97.

jurisprudence, the ICTY asserted for the first time in history that individual criminal responsibility under international law exists for crimes applicable to internal conflicts. Furthermore, it clarified the meaning and scope the principle of command or superior responsibility emphasizing that the relationship between the superior and the subordinate exists even in informal structures as long as an effective command exists. Superiors are not only responsible for orders given but also for failing to prevent a crime or to deter by punishment the wrong doing of his subordinates. The latter apply not strictly to the armed forces but also to civilians in “positions of superior authority.”

Likewise, the rulings of both tribunals have contributed significantly towards the elucidation of the concept of crimes for which they claim jurisdiction. Regarding genocide, the gravest form of crime against humanity, was not a crime under the law of every country, even in certain countries that had ratified the Genocide Convention. The facts and the specifics of genocide were not common to the different legal systems. The ICTY and ICTR statutes restate the definition of the 1948 Genocide Convention. However, they interpreted genocide in broad terms. The victim in genocide is the group and not the individual. Both the tribunals de-linked the concept of protected persons with nationality, and looked at substantial relations rather than formal bonds. In trying to identify that group for terms of its protection and prosecution of the perpetrators, in *Rutaganda* ICTR considered that membership of a group is essentially a subjective concept, but can also be determined in an objective way. It is subjective when the offender perceives the victim as belonging to a group slated for destruction, or if the victim believes also the same. Hutu and Tutsi became distinct ethnic groups only after categorized as such by their colonizers. It can be objective because every Tutsi was carrying an identification document verifying his ethnic identity.<sup>159</sup> Along these lines, the tribunals clarified how to identify the protected group taking into account the political, social, and cultural context of the society in question. They further made clear that genocide is committed not only by acts but also by omissions, and categorized sexual crimes that could be equivalent to genocide,<sup>160</sup> contrary to the Nuremberg and Tokyo

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<sup>159</sup> *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, 6 Dec. 1999, para. 55 and 400-1. Op. cit., 71.

<sup>160</sup> Forms of sexual violence used to prevent births within the group, or cause serious bodily or mental harm to them.

tribunals that omitted sexual violence against women committed in the field by the armed forces.

With regards to crimes against humanity, it must be noted that they have not been defined in a treaty, and their definition has developed inconsistently. The Statutes of the ICTY and the ICTR recognize as such a number of crimes, namely: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts. Whereas only states or individuals exercising state power during the Second World War could commit such crimes, this time the requirement of existence of a state or organizational policy was included. It is the existence of such policy that allows the perpetrator to commit such crimes in such a great dimension, which makes it as a crime against humanity. In accordance with the tribunals' rulings, such a policy need not be conceived at the highest level or be clearly or formally announced. The widespread or systematic manner of the actions is enough to evince such a policy. Actions such as repeated and coordinated military offensive operations in relevant times and places, the creation of military institutions, connections between the military and the political leadership and its program for modifications of the ethnic composition, arbitrary detentions or displacements, and discriminatory measures may reveal such a policy. Furthermore, the ICTY has noted that customary international law has evolved to take into account forces that have de facto control in a territory. Both the ad hoc tribunals have considered a definition of the term "civilian population" is justified with regards to crimes against humanity.<sup>161</sup> Moreover,

The ad hoc International Criminal Tribunals have repeatedly affirmed that torture is prohibited by a general rule of international law and that, as a norm of *jus cogens*, the prohibition of torture is absolute and non-derogable in any circumstances. The Tribunals have also adopted the broad definition of torture contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 which is regarded, in any event, as customary international law.<sup>162</sup>

War crimes covered by the ICTY Statute are both grave breaches of the four 1949 Geneva Conventions, and violations of laws or customs of war. War crimes covered by

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<sup>161</sup> ICTY: *Prosecutor v. Tadic*, and *Vukovar Hospital* cases. ICTR: *Prosecutor v. Akayesu* case.

<sup>162</sup> United Nations Commission on Human Rights, Fifty-seventh session, *Promotion and Protection of Human Rights: Fundamental standards of humanity*, Report of the Secretary-General submitted pursuant to Commission resolution 2000/9, p.7. Available [on line] at:

<http://www.hri.ca/forthecord2001/documentation/commission/e-cn4-2001-91.htm>, 6/19/2002.

the ICTR are serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II. In *Tadic* the ICTY Trial Chamber examined the necessary link between an offence and armed conflict. In its opinion,

the existence of an armed conflict or occupation and the applicability of international humanitarian law to the territory is not sufficient to create international jurisdiction over each and every serious crime committed in the territory of the former Yugoslavia. For a crime to fall within the jurisdiction of the International Tribunal a sufficient nexus must be established between the alleged offence and the armed conflict which gives rise to the applicability of international humanitarian law.<sup>163</sup>

The ICTY has also developed the notion of protected persons in international human rights law. Only if the victims are protected persons then acts from the perpetrators could be characterized as grave breaches thus leading to war crimes. Although up to this point protected persons were defined with literal interpretation of the Geneva conventions, the Appeals Chamber emphasized the need for a flexible interpretation of nationality, stating that international human rights law should be applied with substantial relations and effective diplomatic relations. The ICTY since clarified the principle.<sup>164</sup>

One unique aspect of the jurisprudence of ICTY and ICTR is the effort to create a balance between the application of common law and civil law procedures. Two radically different systems are involved, namely the accusatorial system currently characteristic of the common law countries and the inquisitorial system characteristic of the civil law countries. This has significant impact on the issues of fair trial and of trial *in absentia*.<sup>165</sup> Nevertheless, under Rule 89, the Trial Chambers are not bound by national rules of evidence, and the Chambers of the ICTR have repeatedly noted that no system prevails. Instead it seems that both systems have been applied. Differences though are really important: In civil law systems all the prosecutor's material is provided in advance to both the adverse party and to the Bench hence, the question of what matters consists of

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<sup>163</sup> Ibid, p.7, and cit. 36.

<sup>164</sup> Cases of *Prosecutor v. Tadic*, and *Prosecutor v. Celebici*.

<sup>165</sup> The Statute of the ICTY, which was used as a model for the Statute of ICTR, was drafted by the UN Department of legal Affairs by common law experts. Hence, it is influenced by common law as applied in the IMTs. Likewise, the absence of a provision for trial *in absentia* that greatly disappointed the civil law experts-especially the French-reflects the common law tradition, which refuse to allow a trial to be held in the absence of the accused on account of fair trial and due process.

evidence and which evidence can be admitted seldom arises in civil law criminal trials. In common law systems this question is crucial since the judges will find nothing but the indictment debates over the admissibility of evidence will continue as the trial proceeds. Likewise, the judicial role of the judges in these systems is different. In the civil law systems the judge has a more active role, whereas in the common law systems the parties and not the judge will control the development of the proceedings. Rulings and judgments are also different, e.g., in terms of precedents, formulation, styling etc. However, it should be noted that both civil and common-law systems differ within their own systems from country to country; they have no single and simple meaning. Conversely, but not strangely enough, the judges are left entirely free to adopt the interpretation that they consider more suitable and it is up to them to come with the final style of those legal and practical problems.

To set up such tribunals in a very short period of time is a very complex problem. However, it is obvious from the work of the tribunals so far that they have provided a body of sensible and universally applicable jurisprudence while at the same time trying to capture the social, cultural, political and historical background and to consider it under legal provisions in their decisions. Their jurisprudence has made an important overall contribution to the protection of individuals; they have contributed to the clarification of legal uncertainties, and have added to the progress towards international law. Through the reassertion of the centrality of the human dignity principle in the rules applicable in situations of armed conflict, and especially in internal armed conflict they further developed international law. Likewise, their contribution includes “the clarification of the conditions in which States have responsibility for the actions of non-State entities.”<sup>166</sup> With their rulings there are no evident substantive legal gaps in the protection of individuals in situations of internal violence. There is no need for new standards, and their jurisprudence has clarified existing uncertainties as a re-statement of existing principles. This among other things helps in identifying fundamental standards of humanity that require practical protection.

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<sup>166</sup> United Nations Commission on Human Rights, Fifty-seventh session, *Promotion and Protection of Human Rights: Fundamental standards of humanity*, p.10.

**D. THE IMPORTANCE OF THE U.N. *AD HOC* TRIBUNALS WITHIN THE FRAMEWORK OF INTERNATIONAL SECURITY AND CIVIL-MILITARY RELATIONS**

The experience of the two *ad hoc* tribunals so far has proved constructive in many respects despite the difficulties encountered, and possible weaknesses. Both of them have by now been confirmed as courts of law as a result of their substantial, innovative, and extraordinary activity. In their decisions they have proclaimed their autonomy, which is reflected vis-à-vis, their parent organ, i.e., the U.N. Security Council. The importance of these U.N. *ad hoc* Tribunals in international security and civil-military relations should be addressed in terms of pragmatic political and legal considerations. With their establishment and the reasoning behind it, is clear that the Security Council introduced a new paradigm in the new world order. This new paradigm does not include only political stability and general economic development, but democratic government, ethic harmony, and respect for human rights.

It is important to notice from the beginning that both the ICTY and the ICTR are currently entering their phase of maturity. Nevertheless, the Security Council has created with them a particularly significant precedent, these being the very first time that international juridical bodies were given competence for violations of international human rights law committed within an internal conflict, in a civil war. Various reports drawn up by the United Nations Secretary General make it clear that the Security Council did not intend to create new legal standards with these tribunals. Instead it tried to set up a system whereby the implementation of customary international law could be overseen by independent international judicial bodies, and should therefore be seen as complementary to other efforts at both national and international level.

The establishment of *ad hoc* international criminal tribunals has been criticized worldwide on the grounds that they are limited, political, expensive, and they let some war criminals to go free. They have even been accused of being a cover for selective policies pursued by the World Powers providing them with an alibi for indefinitely deferring the institution of a permanent independent international criminal court to which

even the World Powers are accountable.<sup>167</sup> This imposes a negative effect in the case of ICTY, contributing further to the loss of its legitimization among the Serbs after the 1999 NATO intervention. Interestingly and surprisingly enough, leaders and army officers as “defenders of their country against the all mighty aggressors (as the public perceived the intervention) were practically ‘purified’ of the old crimes.”<sup>168</sup>

In reality however, the experience of these tribunals proved extremely instructive. They have provided and still are providing confidence building and facilitate reconciliation in post-conflict societies. Both Rwanda and the former Yugoslavia are doing much better now in terms of reconciliation seeing that justice has started to be given even to the highest possible level.<sup>169</sup> They further serve as a tool kit for preventing destabilization of entire regions by large population flows. They are doing so, because by penetrating the shield of impunity, they provide adequate security arrangements, they educate the society and the elites in the norms of international law-especially the ones that hold political office and have the means of coercion. They further provide the legal background and guidance for national legal systems and institutions enforcing these norms.

These tribunals are also highly politicized since the U.N. Security Council, an essentially political organ, instituted them. Contrary to what would have been expected, the conventional approach was not used, i.e., the creation of the *ad hoc* tribunals by terms of a treaty like the London Agreement of August 8, 1945. Instead the institutional method was followed, for reasons of expedition and political efficiency. Time for the adoption of a treaty was an unavailable luxury, especially in the case of Rwanda. However, this was an act that penetrated directly into the sovereignty of the states especially in matters of penal sanctions. The basing of competence to create the tribunals on Chapter VII of the Charter instead of Chapter VI signifies the importance of the tribunals in terms of

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<sup>167</sup> They have limited reach and scope, and they can be theoretically selective, since they follow uncertain, politically charged processes. Furthermore, they allow some war criminals to get away due to their limitations. See *Ad Hoc Tribunals Do Not Get the Job Done*, Lawyers Committee For Human Rights (LCHR). Available [online] at: [http://www.lchr.org/IJP/ad\\_hoc.htm](http://www.lchr.org/IJP/ad_hoc.htm), 6/19/2002.

<sup>168</sup> *Civil-Military Relations in the Third Yugoslavia*.

Available [on line] at: <http://www.crisisweb.org/projects/showreport.cfm?reportid=316>, 6/22/2002.

<sup>169</sup> The ongoing trials of Milocevic (ICTY) and the Rwandan high ranking military (ICTR) highlight the reach of the tribunals.



international security. Under Articles 39 and 41 of Chapter VII, the conceived crimes constituted “a threat to international peace and security.” The tribunals meant to be coercive measures taken by the United Nations and not peaceful measurements of disputes that Chapter VI would have evoked. This reasoning and practice created many arguments among the members of the General Assembly, but in the end all the states have cooperated to a remarkable extent.

In the case of ICTR another issue brings light to the set up of such institutions. The third world countries, especially the African states, wanted the creation of the ICTR to be done by the General Assembly with a procedure similar to the ICTY, instead of the Security Council.<sup>170</sup> Nevertheless, this would have eventually put the Security Council in a secondary role, therefore, it was rejected for both expediency and by appeal to Article 24 of the Charter.<sup>171</sup> However, the chosen method for institution of the tribunals, largely imposed by the circumstances, proved effective in terms of rapid establishment of the tribunals. Noticeably, the future of the courts depends only on the Security Council since their jurisdiction is temporal depending on the latter to determine that they have served their purpose. The dissolution of the two tribunals will certainly give rise to numerous problems if done in haste, particularly on account of the time limits allowed for appeals and reviews and of the close institutional ties that exist among the tribunals *per se*.

The ICTY and the ICTR brought the states in their respective regions into closer cooperation among them and with the international community. The safeguards offered by both ICTR and ICTY led the former Yugoslav states, Serbia, Montenegro, and the African states to support and cooperate with them. These safeguards are mainly their recognized independence and competence.<sup>172</sup> Explicitly, their statutes guarantee their independence. Under the ICTY Statute, the nationality of the perpetrator appears of little importance in terms of prosecution by the tribunal. During NATO’s operation *Allied Force* in Kosovo accusations against it reached the tribunal. The Prosecutor has

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<sup>170</sup> Djiena Wembou, *The International Criminal Tribunal for Rwanda. Its role in the African context*, International Review of the Red Cross, No 321, (685:693), 1997.

<sup>171</sup> Article 24 of the U.N. Charter invests the Security Council with primary responsibility for international peacekeeping and security.

<sup>172</sup> Djiena Wembou, *The International Criminal Tribunal for Rwanda. Its role in the African context*, p.1.

confirmed that that the ICTY has jurisdiction over crimes committed under its Statute “by anyone,” and has publicly repeated that investigations are carried out in all directions.<sup>173</sup> On May 13, 1999 a Press Release from the Office of the Prosecutor stated that on 24 March 1999, 19 European and North American countries had

...said with their deeds what some of them were reluctant to say with words. They have voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations, whose reach is unqualified by nationality, whose investigations are triggered at the sole discretion of the Prosecutor and who has primacy over national courts.<sup>174</sup>

It is very important for the legitimization of the tribunals not to hold back their attempts to bring to justice all those believed responsible for war crimes. Especially in the case of the ICTY investigations should proceed towards all ethnic groups even-handedly. Only then stability, peace and security are much easier to establish. Justice must not only be done, it must also be seen to be done.

Moreover, in terms of legitimacy, the election of their judges belongs to the U.N. General Assembly, on the basis of a short list of candidates selected by the Security Council. The latter provides necessary legitimacy and moral support to the judiciary bodies. In these terms their competence in trying serious violations of human rights law even in neighboring countries (ICTR), because the U.N. backs it up, prompted the cooperation between those states and the tribunals. This is of outmost importance because the prosecutor common to both tribunals does not possess any of the enforceable investigative powers available to national authorities in criminal investigations. In every investigation the Prosecutor relies on the co-operation and the assistance of the states. In 1997 the African Heads of States undertook to cooperate with the ICTR, particularly in arresting the accused and transferring them to the tribunal. For the first time in African history there were efforts to disseminate and impose respect for international human rights law among states and local communities. The transfer of wanted criminals from Cameroon, Gabon, and Kenya provides proof that the political support is meaningful at least at that level. Likewise, after the general election in the Federal Republic of Yugoslavia that ended the Milosevic regime, he was transferred to the ICTY in June

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<sup>173</sup> Press Release, Office of the Prosecutor, March 31, 1999, CC/PIU/391-E.

<sup>174</sup> Press Release, Office of the Prosecutor, May 13, 1999, CC/PIU/401-E

2001. Milošević, who is currently on trial, is the ICTY's high point in practical terms as the first ever serving head of state.<sup>175</sup> Furthermore, in the case of the Federal Republic of Yugoslavia, federal legislation passed a law for the removal of any objects for the arrest and extradition to the ICTY of the accused by the tribunal as late as April 11, 2002, after the United States had frozen about forty million dollars in aid.<sup>176</sup> Hence, the question of cooperation with states has not only proved to be realistic and pragmatic, but also has proven to be a success as long as the tribunals were supported by the World Powers.

The link between the Statutes of the *ad hoc* tribunals and the maintenance of peace is observed more clearly in the provisions concerning the execution of their decisions. These are primarily entrusted to states, and to the Security Council only if states fail their obligations. But the main effort of the *ad hoc* tribunals is to enhance national reconciliation, and respect for human rights by baring impunity. This may be difficult to achieve in cases like Rwanda where a vast majority was involved in the genocide. It was nothing like the Holocaust where mass extermination took place in camps or crematoriums with the use of gasses or firing squads. In Rwanda primitive weapons were used symbolically and in close quarters with the victims requiring the participation of thousands. However hard this may be, Rwanda has chosen justice and respect for the law in reaching reconciliation.

The ICTR has nothing to do with bodies like the Truth and Reconciliation Commission in South Africa.<sup>177</sup> The case of South Africa is based on a different premise.

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<sup>175</sup> Milošević's transfer to the ICTY by the Serbian authorities was affected under huge international pressure and almost immediately caused the fall of the then federal Yugoslav government. It is clear that the ICTY has neither the mandate, nor the resources, to be the primary investigative and prosecutorial agency for all criminal acts committed in the territory of the former Yugoslavia and especially in Kosovo. This will be most probably will be the responsibility of UNMIK assisted by KFOR. However, methods used by the ICTY to arrest accused individuals had been criticized in 1997 when certain Western states used unusual methods to bring them to justice. The use of specially trained and equipped units and NATO's SFOR that led to the death of one of the accused raised the question whether the end justifies the means. This kind of action further encloses the danger of war criminals to mislead public opinion, the tribunal to lose its legitimacy and enable them to escape justice.

<sup>176</sup> This US practice is considered to be inherently risky by the Europeans. Instead the European Union is providing aid to Yugoslavia but it does not tie it with the achievement of political goals. See the Fourth Report of the House of Commons, United Kingdom, Foreign Affairs. Available [online] at: <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmfa/246/24605.htm>, 6/22/2002.

<sup>177</sup> Chris Maina Peter, *The International Criminal Tribunal for Rwanda: bringing the killers to book*, International Review of the Red Cross, No 321, (695:704), December 31, 1997.

It was a part of a process of national transformation and the establishments of democracy with free democratic elections and the establishment of a new constitution. This was mainly a national process with no direct involvement. In Rwanda such as solution has not matured yet. There is still regional instability and there are still many hard feelings between Hutu and Tutsi, but the ICTR can only further the reconciliation process. The tribunal relies much on international support. Furthermore, it seems that the international community by establishing the tribunal gives emphasis on prosecution of criminals and on combating impunity. However important this may be, satisfying it while pursuing national reconciliation is proving to be a very difficult task. If the world wants to reconstruct Rwanda, this will require a commitment and resources. Even more, it will require local and regional legitimacy due to the historical memories preceding decolonization. Likewise, a Truth and Reconciliation Commission has been proposed for Yugoslavia. In this case it is not just one state, or only Serbia; it is also Croatia, and Bosnia Herzegovina not to consider Kosovo and Montenegro as states of the Federal Republic of Yugoslavia. The amnesty given to thirty thousand Kosovar Albanians on March 7, 2001 is helpful, but any real reconciliation must come to the region as a whole. To that end, the ICTY justice if fair and not selective has much to offer.

These ongoing processes face the difficult task of creating new and different notions of security and armed forces that will diminish the possibilities of future abuse of the military. For that to be achieved a necessary normative framework has to be implemented. This normative framework, consisting predominantly of a new constitution and laws, must be respected by all the actors internally. However, respect for the law starts with the fear of the police officer. Most individuals are largely motivated by fear of the punishment that may occur, among other ethical or moral issues. ICTY and ICTR have a lot to offer in that perspective. These *ad hoc* tribunals have shown that international repression of serious violations of international human rights law is no longer a purely theoretical concept.<sup>178</sup> Even so, it is clear that the significance of

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<sup>178</sup> ICTY November 14, 2002 status: 79 Indictes -55 currently in proceedings before the tribunal (44 in detention, 11 provisionally released), 24 remain at large. Available [online] at:

<http://www.un.org/icty/glance/index.htm>, 11/14/2002.

ICTR September 30, 2002 status: 61 detainees (22 on trial, 31 awaiting trial, 1 awaiting transfer, 1 pending appeal, 6 serving sentences).

tribunals like these do not lie in the number of persons who appear before them, but in the signals sent out by their creation and jurisprudence.<sup>179</sup> Their statutes, rules of procedure and evidence, and their practice show that impunity is no longer acceptable in a universal level. Even the fear that the tribunals might preempt national prosecutions could also have the beneficial effect of changing national legislation, and spur prosecutions before the national courts. Nevertheless, the tribunals should have in mind their political settings and regional sensitivities. This does not imply anything more than showing understanding of the domestic political difficulties faced by Yugoslavia and Rwanda in acceding to the demands. A hostile attitude towards societies that have suffered much is neither needed nor required in demanding and achieving justice as the road to reconciliation, peace and stability. Legitimization in the “eyes of the beholder” is critical for both the tribunals.

In Yugoslavia, and especially in Serbia new legislation started to emerge by the middle of 2002 under considerable international pressure and domestic disapproval. The Serbs, both the majority of the masses and the elites, share the view that it is preferable for Serb citizens to be tried by a domestic court. In their view ownership of the process is as important as the judicial procedure itself. Currently twenty-nine trials for crimes against humanity are underway in military courts, and one in a civilian court but not a single trial has been conducted or even handed down for the crimes in Kosovo. However, the minorities and the moderates have under the international pressure to transfer war criminals and proposals for change hoping that the trials in the ICTY will expose the Milocevic regime’s strategies and policies in the last twelve years. This will eventually strengthen them in political terms, and they will further consolidate their power. Hence, during November 2001 the Serbian Minister of Justice replaced one hundred and eighty seven judges, and issues included in the parliament’s agenda are the necessary penal code amendments, laws on criminal procedure among others. The judicial system today is unreliable, prone to political pressures and manipulation.<sup>180</sup> Therefore, the changes to

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Available [online] at: <http://www.icty.org/wwwroot/ENGLISH/factsheets/detainee.htm>, 11/14/2002.

<sup>179</sup> Chris Maina Peter, *The International Criminal Tribunal for Rwanda: bringing the killers to book*, p.2.

<sup>180</sup> *Serbia Still at the Crossroads*, United States Institute of Peace, Special Report, March 15, 2002, p. 7.

the system are just emerging. Due to major domestic disapproval so far, they were just cosmetic without any legal reforms.

In Kosovo many of the democratic institutions that have currently been built under UNMIK adhere to principles and norms clarified and protected under the rulings and the Statute of the ICTY. The success of those institutions will eventually reduce or reverse violence from the KLA against the Serbian minority. It will most probably determine if the population that fled to neighboring countries, influencing the Balkan and European security and stability will ever return and if KFOR will still be required to provide security. One of the problems that UNMIK had to face from the outset was the reformation of the judicial system to the one prior to the province's loss of autonomy in 1989.<sup>181</sup> This happened with modifications to take account of international human rights legal standards, including the development of the latter by the ICTY and the ICTR. In order to provide impartiality, international judges and prosecutors were introduced applying norms as they were clarified by the ICTY, and since this is a short-term palliative, training has started for one hundred local judges. However, the real positive hope for the stability of the region in the future will be the development of a democratic reformed Federal Republic of Yugoslavia. This will require for the elites and the masses in Yugoslavia to accept the ICTY, and its norms as impartial.

In the former Yugoslavia political and military elites shared not only the same values, but as the ICTY has shown, the responsibility for the war crimes committed. This was to be expected since silent politicization has always been a reality within the army's ranks. It is not surprising that the ICTY did not deter the Kosovo events. Many officers had achieved the highest positions in the armed forces due to their conduct in the war with Croatia and Bosnia hence; they shared the same responsibility for war crimes all over the territory of the former Yugoslavia. An alliance was developed based upon mutual crimes, fear and mistrust. However, regarding internal missions the military operated even under Milocevic regime in a more restricted manner, dealing only with matters of vital significance for state existence.<sup>182</sup> Careful analysis will reveal that the

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<sup>181</sup> Due to Kosovo's status as a constituent part of Yugoslavia, the U.N. Legal Department insisted that Yugoslav law remained valid in the territory of Kosovo hence; the Kosovo Albanian judges started boycotting the system.

<sup>182</sup> Hence, the armed forces did not interfere with the political uprising in Serbia between 1996 and

military were-and still are-divided along functional and political lines, and that they actually presented politically a paper tiger that could not influence the political decision-making progress. In 1996 the Chief of the General Staff admitted he had things to tell the media but he will not reveal anything because he is a disciplined soldier. The military were as traumatized as the society they served. After October 2000 a most promising reform started in terms of replacing officers associated with the Milosevic regime and possible war criminals. Forty-nine generals were retired and several commanders were replaced until the Chief of Staff halted the reform, although he is the same individual who agreed on the ICTY issue.<sup>183</sup> This was mainly done due to the involvement of the latter to politics. Although throughout 2001 very little was done to restructure the army, a law on the civilian control of the military is being drafted. Until June 2002, there was no evidence of meaningful reform of the armed forces. However, on June 25, 2002 the Yugoslav President issued a decree ending the professional military service of the Chief of Staff General Nebojsa Pavkovic “for the sake of civilian control and for the sake of democracy.”<sup>184</sup> The General “urged parliament to resolve the dispute” and although he discussed the President’s action with an unknown number of senior generals at the headquarters he gave an evening news conference where he stated that his intention was to “use all legal means to challenge the decision of the president.”<sup>185</sup> Although there is currently a significant power struggle on going, the latter won unequivocal backing from the Europeans, and hopefully will lead to the much-needed reforms.<sup>186</sup>

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1997 when the General Staff issued a declaration of neutrality. In the lower ranks officers expressed their unwillingness to obey orders to move against pro-democracy students and demonstrators in Serbia.

<sup>183</sup> The Chief of Staff General Nebojsa Pavkovic, former commander of the Third Army, which was responsible for Kosovo during the NATO air strikes, he had openly campaigned for Milocevic during the 2000 elections. To the eyes of the Serbian public is seen either as the heroic general who defied NATO, or as a corrupt Milosevic crony will several villas in Belgrade. He recently gets into disputes and arguments with ministers, and even the Minister of Defense learned the retirement of his staff from the media.

<sup>184</sup> *Fired Army Chief Vows to Challenge Dismissal*, Los Angeles Times, June 25, 2002 Tuesday Home edition, Part A, Part 1, p.4.

<sup>185</sup> *Ibid.*, p.4.

<sup>186</sup> Javier Solana, the European Union’s top foreign official stated, “Civilian Control of the military is a basic principle of democracy and a vital element for the country’s ability to continue on the path towards European integration. I support all steps taken by the Federal Republic of Yugoslavia to consolidate this fundamental principle.” *Kostunica gets military, EU support after sacking army chief*, Jean-Eudes Barbier, Agence France Presse, June 25, 2002.

Despite the fact that progress has been slow, and that the ICTY is still considered to be a hostile foreign organization exerting pressure on the Yugoslav authorities for the extradition of former members of the military, changes are indeed emerging. They include the reduction to military service to nine months, changes in the organization-formation structure of the Army,<sup>187</sup> the abolishment of the branch military academies and their replacement by a single military academy, the military downsizing from 105,000 to 80,000 initially (phase one) and 65,000 finally (phase two), the transfer of the General Staff to the Ministry of Defense, a reduction of the military budget between 2000 and 2001 by the Federal Parliament,<sup>188</sup> the sale of surplus military facilities, the subordination of the Army Inspector to the Supreme Defense Council, and the early retirement of a number of generals.<sup>189</sup> More important, after October 5 it became customary for the Defense Minister to be a civilian,<sup>190</sup> the heads of the Ministry of Defense have on a number of occasions publicly showed their devotion to the democratic control of the military, along with the General Staff's excessive use of the wording "civilian control of the military" in public.<sup>191</sup> The problem however, is the democratic control of the military and not just the control of it. It is not just the legal provisions that need to change but the legitimacy of the whole model. It should be noted that the 2000 elections in which the president was elected directly from the people and the very recent adoption from the Federal Parliament of the Law on FRY Security Services on 2002 are steps in the right direction. This latest law specifically places the Military Security Department, the Military Intelligence Service, the Federal Foreign Ministry Information and Documentation Service, and the Federal Foreign Ministry Security Service under the control of the Federal Parliament and the Federal Government.<sup>192</sup>

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<sup>187</sup> The commands of Navy, Air Force, and Air Defense were abolished, and nine corps were formed, directly controlled by the VJ General Staff.

<sup>188</sup> However, there is no evidence that the parliamentary committees are in control of the budget and its reduction.

<sup>189</sup> Gradually the staff of the high commands and departments has been replaced.

<sup>190</sup> However, the first two appointed to the post were a surgeon at fist and an agronomist latter.

<sup>191</sup> Miroslav Hadzic, *Civil Military Features of the FR Yugoslavia*, Research-CCMR Beograd, p.7. Dr. Hadzic is Faculty of Political Science Belgrade/Center for Civil-Military Relations.

Available [online] at: <http://www.ccmr-bg.org/analize/istrazivanja/research4pint.htm>, 11/12/2002.

<sup>192</sup> The law was promulgated on July 2, 2002 (FRY Official Gazette, No. 37/2002). ,



However, the constitutional and institutional arrangements have not been changed. There are plans for a new constitution within 2003<sup>193</sup> but until then, the old federal constitution is in effect. Even more, the existing legal framework of the defense system in Yugoslavia is dysfunctional and conflicting. The constitutions of Serbia and Yugoslavia are mutually colliding; the principle of separation of powers is still just a proclamation, and all the powers are in the hand of the executive apparatus.<sup>194</sup> Elementary human rights are neglected in the Serbian constitution, where no rights or liberties are completely inviolable since the exercise of every right can be restricted on the basis of a decision by the Serbian President. Likewise, the existence of military courts in Yugoslavia is considered to be an anachronism. They have jurisdiction over civilians. Military judges have been criticized for not being independent and not real judges according to international criteria.<sup>195</sup> The Ministry of Defense is a second rank institution existing parallel to the General Staff administering issues not related directly to the management of the armed forces but instead it just secures funds for them from federal Assembly.<sup>196</sup>

Things are similar if not worse within the police and their special operations units. They remain the same, unreformed and may potentially be a threat to the government itself. Although two Bosnian Serbs were arrested in November 2001 by the Serbian Interior Ministry's "Red Berets" to be transferred to the ICTY, the latter stated that they

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<sup>193</sup> The implementation of the new constitution was postponed on September 24, 2002. However, after pressure for reforms it seems that will most probably be adopted within 2003. Its draft so far includes provisions stating that the military will be under civilian democratic control, and abolishing the existing system of special military courts. Under the new constitution military personnel will be tried in civilian courts, which will most probably include specialized military chambers.

<sup>194</sup> Miroslav Hadzic, *Civil Military Features of the FR Yugoslavia*, p.2. More specifically, according to the Federal constitution defense is under the exclusive jurisdiction of the federal authorities contrary to the Serbian constitution that explicitly states that the defense and security of Serbia and its citizens is a responsibility of the Republic. See also, Dimitrios Koukourinos, London School of Economics and Political Science (UK), *Constitutional law and the external limits of the legal framing of DCAF: The case of Croatia and the FR of Yugoslavia*, p. 9-15. Paper prepared for a Seminar "Legal framing of democratic control of armed forces and the security sector: norms and reality/ies" Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, Switzerland, 4-5 May 2001.

<sup>195</sup> *Security Concerns citizens, not the State*, Compendium of Yugoslav laws on the Security Sector: Human rights and Democratic Oversight Aspects, CCMR Belgrade 2002. Available [online] at:

<http://www.ccmr-bg.org/vesti/fmccmr0002.htm>, 11/12/2002.

<sup>196</sup> Dimitrios Koukourinos, London School of Economics and Political Science (UK), *Constitutional law and the external limits of the legal framing of DCAF: The case of Croatia and the FR of Yugoslavia*, p.13.

wanted no further arrests to be made, they were used against their will in that operation. They even requested the resignation of the Minister of Interior, who finally promised that while he is in charge no member of the police force would be transferred to The Hague.<sup>197</sup> One of the main problems for the existence of this situation can be attributed to the inexistence of an unambiguous legal basis or better, the *de facto* inexistence of a legal basis.<sup>198</sup> Hence, the former regime's power structure remains at large. Although there are no instant solutions very recently, on July 18 2002, the Yugoslav Parliament and the Serbian legislature adopted the Law on the Security Intelligence Agency on federal and republic level. The passage of both laws, even if their quality is questionable, is an important landmark.<sup>199</sup> These laws signify a break with the undemocratic practice that has lasted for several decades, since the security agencies have been operating in a legal vacuum. Likewise, the Ministry of Internal Affairs in Serbia issued on February 3, 2001 an order to its members to strictly comply with legal provisions when performing their duties, prepared a report for the Serbian Parliamentary Committee, had relieved of duty about 2,500 of its members, and elements of decentralization have just started to be implemented.<sup>200</sup> However, under the current power setting occasional setbacks are inevitable and it remains to be seen if these laws will prove to be meaningful or just cosmetic.

Additionally, it is important to notice the public's reaction to the ongoing reforms. In a research conducted by the Center for Politicological Research and Public Opinion of the Belgrade Institute of Social Sciences between March 3 and 10, 2001 showed that the public in Serbia (excluding the territories of Kosovo and Metohija) is approving by 51% changes in the military, and is overwhelmingly by 74.9%, approving the necessity of

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<sup>197</sup> *Serbia Still at the Crossroads*, United States Institute of Peace, p. 8.

<sup>198</sup> Budimir Babovic, *On police reform in the Federal Republic of Yugoslavia and Serbia*, Working Paper Series-No 10, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, April 2002, p.2.

<sup>199</sup> Dr. Bogoljub Milosavljevic, New Legislation on Republic of Serbia's State Security Service, Word of Experts, CCMR Belgrade. Available [online] at:

<http://www.ccmr-bg.org/analize/rec/word2.htm>, 11/10/2002.

<sup>200</sup> Budimir Babovic, *On police reform in the Federal Republic of Yugoslavia and Serbia*, p.21.

gradually integrating into the European defense institutions; first of all to PfP.<sup>201</sup> Likewise, as Dr. Miroslav Hadzic remarks,

The opinion that the inherited army should be reformed is increasingly present in the public, and that in this respect first the generals that Milosevic chose and appointed should be dismissed. This is also encouraged by the increasingly frequent public address of the issue of FRY membership in the PfP, with the dominating awareness that this includes the radical reform of the Army. At the same time it seems that the public is additionally familiarized with the idea and concept of democratic civil control of the military. It is not excluded that the same idea started circulating within the army, and that professional soldiers could soon discover the benefits that are to be gained from such control of the VJ.<sup>202</sup>

This is another reason for the ICTY not only to be impartial but to look impartial too. It is imperative for the legitimization of the ICTY not to look just anti-Serbian in the former Yugoslavia. To that the committee established from the ICTY Prosecutor for alleged NATO crimes against Yugoslavia during the Kosovo air campaign was definitely towards the right side.<sup>203</sup> This will help Yugoslavia in its effort to become member of the Partnership for Peace (PfP) by the end of 2002. According to the Yugoslav officials, their military have the “capacities to take part in programs and exercises of PfP, such as particular police units, engineers, medical corps and helicopters.”<sup>204</sup> However, arresting suspects from ICTY and drafting a “new army” model are prerequisites for that. It has been made quite clear so far to the Yugoslav decision makers that a possible request from

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<sup>201</sup> Milorad Timotic, M.A., *The attitudes of Serbian public toward the Army and defense*, Center for Civil-Military Relations, Belgrade, 2002, p.2. Available [online] at:

<http://www.ccmr-bg.org/analize/istravivanja/research3print.htm>, 11/11/2002.

<sup>202</sup> Miroslav Hadzic, *Civil Military Features of the FR Yugoslavia*, p.9.

<sup>203</sup> NATO servicemembers and policy makers were accused for war crimes for the NATO air campaign over the former Yugoslavia in 1999. Therefore, a committee was set by the ICTY Prosecutor in May 1999 to assess the allegations. The latter’s final report of June 2000 “exonerated all NATO personnel from all blame by deferring to the honest judgment of the soldiers in the field and the military strategists at the relevant time.” Kriangsak Kittichaisaree, *International Criminal Law*, p. 163. For a critique of the Committee’s decision see Natalino Ronzitti, *Is the non liquet of the Final Report by the Committee Established to Review the NATO Bombing Campaign Against the federal Republic of Yugoslavia acceptable?*, *International Review of the Red Cross*, No. 840, (1017: 1028), December 31, 2000.

The Final Report is available [online] at: <http://www.un.org/icty/pressreal/nato061300.htm>, 6/27/2002.

<sup>204</sup> *Yugoslavia in Partnership for Peace by the end of the year?* From the media, September 26<sup>th</sup> 2002, Center for Civil-Military Relations Belgrade. Available [online] at:

<http://www.ccmr-bg.org/vesti/frommedia/media0014print.htm>, 11/11/2002.

them for Yugoslavia to join the Euro-Atlantic structure demands certain conditions and actions as conditions of acceptance, particularly their cooperation with the ICTY.<sup>205</sup>

In terms of the ICTR the following must be acknowledged. In the societal and structural level, the tribunal helps in raising people's awareness of the importance and value of human life. It contributes to a process of normalization and in restoration of a peaceful society and a stable Rwanda. The restoration of civil administration and the reconstruction of the social fabric of the country are done through the prism of its rulings. This has a definite impact on the military, which will start to embrace these values either from habituation or from fear of coercion. The ICTR came as unpleasant to those who wanted by any means to stay in power. On April 2, 2002, with the opening of the *Military Trial* in Arusha the tribunal sends a clear message to that particular elite that those who abuse human life will be held responsible. Article 3 of the Charter of the Organization of African Unity (OAU), which provided for non-interference in the internal affairs of its members, does not give them shelter anymore.

The dual system of prosecutions from both the ICTR and the national courts in Rwanda has its own problems. One of Rwanda's objectives in requesting the establishment of an international tribunal was to gain the support necessary for the functioning of its own criminal justice system. That was also addressed in Resolution 955, when the Security Council stressed that international cooperation was necessary for the domestic judicial system and courts *inter alia* because of the large number of suspects. This has turned out to be a relative success in the long run. Nevertheless, the ICTR tries the more serious cases but it can impose by its Statute only up to life imprisonment contrary to the death penalty, which is still an option under the Rwandan penal code. Hence, minor actors in the genocide are receiving severe punishment by the national courts, which may even give the death penalty. The latter within the Rwandan culture may send the wrong message, especially to the military commanders.

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<sup>205</sup> Ibid. See also, Zeljko Ivanis, Partnership for Peace, Yugoslavia making decision to join, Compendium of the Faculty of Civilian Defense, Belgrade University, Belgrade, 2001. Available [online] at:

<http://www.ccmr-bg.org/analize/istrazivanja/research1print.htm>, 11/11/2002.

The ICTR has an important role in the Rwandan government's efforts to build a new judiciary, and implement new legislation. The government in Rwanda is currently undertaking the material reconstruction of the judicial system and the training of its staff. For it is its own system that has the burden to give a legal response and create the normative environment for a new society, military, and government. The detainees number more than one hundred thousand a figure that not even a highly developed country can deal with, and certainly not a country that traditionally the judiciary has been subordinate to the executive authority. The training now at the Nyabisindu Judicial Training Center is much influenced by the happenings in Arusha. Likewise, the government introduced a specific constitutional law<sup>206</sup> to face the genocide and crimes against humanity between October 1, 1990 and December 31, 1994. This was done in order to remove the ambiguity of the direct applicability of international legal rules in the domestic legal system, especially in the Rwandan Penal Code. In that attempt, genocide and crimes against humanity have much driven from the relevant ICTR thinking and practice.<sup>207</sup> In the first category of this law the persons who abused their position of authority, the military, and militias are included among others. Furthermore, the Bar was created in 1996. On November 30, 1996 the Prosecutor General of the Supreme Court published an initial list of 1,946 individuals in this category. On April 20, 2001 although opposed mainly by the Europeans, the Commission of Human Rights decided to end the mandate of the special representative and to end its consideration of human rights in Rwanda. Moreover, a technical cooperation agreement was signed between the Office of the High Commissioner for Human Rights and the Rwandan Commission on Human Rights. Hence, the system is changing gradually.

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<sup>206</sup> Organic Law of August 30, 1996 on the organization of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, Law No. 8/96, *Official Gazette of the Republic of Rwanda*, 30 August 1996.

<sup>207</sup> Channels of appeal similar to the ICTR, reduced sentences compared to the ones under the Penal Code, etc. It even includes a confession and guilty-plea procedure mechanism entirely new to Rwanda but similar to the widely used practice of plea-bargaining in the United States of America. However, the official launch on June 18, 2002 of the new *Gacaca* courts system, a form of participative popular justice at the village level, is much criticized as unfair and flawed. An optimistic appreciation of the relations between the ICTR and the Rwandan national criminal courts can be found in Olivier Dubois, *Rwanda's national criminal courts and the International Tribunal*, *International Review of the Red Cross*, No. 321, (717:731), December 31, 1997.

Likewise the military education and the military justice system are changing but very slow. With significant help by the U.S. and the U.K. opened files on 843 military personnel during 1999, and carried out two hundred and ninety five trials that led to twenty seven death penalties.<sup>208</sup> Hundreds of soldiers and officers were enrolled in U.S. training programs, both in Rwanda and in the United States. That training dealt almost exclusively with human rights and military justice as early as 1995.<sup>209</sup> More recently the Rwandan military officers started being educated in international human rights law in their own military academies, providing them a basic knowledge of the law and the rules of combat.<sup>210</sup> Likewise, the PRF regime in Rwanda has consistently asserted its intention to convert its highly militarized system of government into a democratic system supported by a new constitution.<sup>211</sup> The implementation of this new policy and reform program is hoped to lead in an administrative devolution and decentralization in the forthcoming nationwide elections on 2003.

This by no means implies that everything has changed for the better in Rwanda. The PRF has the military and political control. Moreover, it does not tolerate criticism to its authority.<sup>212</sup> There is much insecurity among the people regarding both internal and external armed conflicts to which the military is the only institution that can establish a climate of confidence and security. The fact is that Rwanda remains a country at war, and behaves as such. However true the latter is, and regardless of the progress that seemed to have been made, the conduct of the Rwandan military has recently been put under

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<sup>208</sup> Rwandan Patriotic Army, Department of Auditorat Militaire, Annex B, Annual Report, 1999. Cited on Human Rights Watch. Available [online] at:

<http://www.hrw.org/reports/2000/rwanda/Rwan004-09.htm>, 6/21/2002.

<sup>209</sup> *Summary Report to Congress on U.S. Military activities in Rwanda*, 1994-August 1997. Available [online] at: <http://www.defenselink.mil/pubs/rwanda/summary.html>, 6/21/2002.

<sup>210</sup> On December 2000 260 company commanders and non commissioned officers were exposed in a humanitarian law seminar organized by the Red Cross.

<sup>211</sup> *"Consensual Democracy" in Post-Genocide Rwanda: Evaluating the March 2001 District Elections*, International Crisis Group (ICG), Africa Report No 34, October 9, 2001, p.2.

<sup>212</sup> *Rwanda At The End of the Transition: A Necessary Political Liberalisation*, ICG Report, 11/13/2002, p.1. Available[online] at:

<http://www.intl-crisis-group.org/projects/showreport.cfm?reportid=817>, 11/14/2002.

As it is noted in the first page of the report "The opposition has been forced to exile, and anti-establishment speeches relegated to secrecy. In the name of unity and national reconciliation, the various segments of Rwandan society are subjected to a paternalistic and authoritarian doctrine and cannot express themselves freely."

question again. On May 28, 2002, the Democratic Republic of Congo (DRC-former Zaire) initiated proceedings against Rwanda for “massive, serious and flagrant violations of human rights and of international humanitarian law” resulting “from acts of armed aggression perpetrated by Rwanda on the territory of the Democratic Republic of the Congo in flagrant violation of the sovereignty and territorial integrity of the Democratic Republic of the Congo, as guaranteed by the United Nations and OAU Charters.”<sup>213</sup> Even more, up to November 2002 there are multiple restrictions on political and civil liberties partly justified by the fragile situation the state of Rwanda faces since 1994. Nevertheless, in less than a year multi-party elections followed by a referendum for the adoption of the new constitution have been planned. There is certainly a momentum to the right direction but due to the security issues that Rwanda is facing from the neighboring countries, mainly the DRC; a long-term undertaking will be required.<sup>214</sup>

The ICTR’s role in the African context is of utmost importance. It enjoys the support of the majority of the African states. The Harare Summit, the Council of Ministers and the mechanism of the OAU for conflict prevention have repeatedly called for their member states to respect and enforce international law and cooperate with the ICTR. Interestingly enough, the African states now broadly support the tribunal perhaps because it is convenient or it is the lesser evil to their aims, and perhaps because there is some merit to supporting it. Then again, this was one of the aims of the ad hoc tribunals, to help the states to cooperate in terms of engaging themselves in common-binding structures and institutions that respect international human rights law. Since 1996 seminars on the enforcement of international human rights law have been organized throughout the continent, and elites and bureaucracies are exposed to their ideas and protected values. African political leaders, officers, officials, and even the civil societies want to know more about issues such as war crimes, genocide, the Geneva Conventions, and the areas that can cooperate with tribunals such as the ICTR. Some African states are

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<sup>213</sup> Press release of 28 May 2002, International Court of Justice. Hearings begun on June 13, 2002. Available [online] at:

[http://www.icj-cji.org/icjwww/ipresscom/ipress2002/ipresscom2002-15\\_crw\\_20020568.htm](http://www.icj-cji.org/icjwww/ipresscom/ipress2002/ipresscom2002-15_crw_20020568.htm), 6/21/2002.

<sup>214</sup> For the situation up to 1997 see Gerhard Erasmus and Nadire Fourie, *The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa’s Truth and Reconciliation Commission?*, International Review of the Red Cross, No 321, (705:715), December 31, 1997.

currently reviewing their legislation, looking upon their constitutions and their penal codes, and comparing them with the requirements of the international standards. Others, such as Benin, Mali, and Burkina Faso have requested help for revising important pieces of national legislation such as their civil-military code provisions.<sup>215</sup>

## E. CONCLUSIONS

The creation of *ad hoc* tribunals by the Security Council such as those created for the former Yugoslavia and Rwanda, marks a considerable advance in the struggle against impunity, and violations of human rights. A new doctrine in the post Cold War era has been introduced, that includes political stability, economic development, democratic governing, ethic harmony, and respect for human rights. This respect for human rights is examined under the fundamental concern where international justice could help create a real and lasting peace and stability in places torn apart by civil wars, armed conflicts, and genocides. In countries such as the former Yugoslavia and Rwanda during the last decade even human dignity has been trampled on a large scale. By punishing those responsible for the horrific crimes in those states, it will deliver a powerful message to the political, military authorities and warlords worldwide: they will be tracked down, and one day, sooner or later, they will be brought to justice; it is too small a world for them to hide.

The U.N. *ad hoc* tribunals' mandate is not to develop international law; the standards already exist. However, like any other judicial body they clarify applicable rules of international law, and thus reaffirm that international human rights law exists, that international criminal law exists, and gradually develop them in some cases. It is more than certain that their jurisprudence will cause significant legal development in national legislatures adding to the protection of individuals, reduce any national or international legal gaps, clarify legal uncertainties, and bring again, after Nuremberg, the principle of human dignity to the center of the political and legal debate especially when it comes to internal conflicts.

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<sup>215</sup> Djiena Wembou, *The International Criminal Tribunal for Rwanda. Its role in the African context. Ibid.*



However, their mandate should be considered also in narrower terms, i.e., in terms of pragmatic political and legal considerations in terms of their creation and in capturing the social, cultural, political, and historical background for Yugoslavia and Rwanda. The aim is to be a part of the tool kit for building confidence and reconciliation in their post-conflict societies and prevent destabilization of their regions. Both tribunals showed that the cooperation of the neighboring states is a reality due to the support of the World Powers, mainly the West, to the tribunals.

Likewise, the *ad hoc* tribunals' contribution within the civil-military relations should be examined under those pragmatic and legal considerations. So far even being supported by the West changes started emerging only recently, and is the future that prove them real or just cosmetic; a hypocrisy by the elites holding office to provide themselves with aid, to eliminate their rivals, and to consolidated power.

It is indeed true that the tribunals face a lot of problems by their setting. It is also true that the situation in the former Yugoslavia is in flux within the society, the state, and the military, and Rwanda-despite recent positive moves towards peace-is still fighting a war with insurgents and the DRC.<sup>216</sup> Their progress has been different; institutional and legal reforms have already started in Yugoslavia contrary to Rwanda where any progress has been limited and fragile, especially within the military. The year to come will be a crucial one for the credibility of constitutional reforms in both countries. As long as international aid continues, the tribunals will fulfill their mandate. Nevertheless, both the ICTY and the ICTR have by now been confirmed as courts of law as a result of their extraordinary activity. Moreover, they are now entering their phase of maturity hence it is very important for them not to hold back on attempts to bring to justice those believed responsible for the horrific atrocities. This should be done not just by the fear of the police officer that they have to create, but also with the legitimization of the tribunals *per*

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<sup>216</sup> Although peace talks have started as soon as the summer of 2002 between Rwanda and DRC, recent incidents in Uvira made U.N.S.G. Kofi Annan to urge the leaders of both countries to stay the course towards peace. Finally, during talks held on November 1, 2002 DRC and Rwanda signed a new peace accord giving an extra ninety days to Rwanda to implement the July 30, 2002 accord and withdraw its troops from DRC. See, *Annan outlines steps to consolidate peace in DR of Congo*, UN News service 11/1/2002, and *Extra 90 Days to implement Rwanda-DRC Peace Accord*, [allafrica.com](http://allafrica.com) 11/4/2002.

Available [online] at: <http://www.un.org/apps/news/story.asp?NewsID=5237&Cr=DR&Cr1=Congo>, 11/1/2002, and <http://allafrica.com/stories/printable/200211040205.html>, 11/4/2002 respectively.

se within Yugoslavia and Rwanda. Efforts by the international community and the West should be seen as a long-term commitment; hence the recent developments towards peacekeeping in terms of maintaining the United States of America commitment in this kind of operations are encouraging.<sup>217</sup> This bottom up method will influence masses and elites, and will create structures and institutions that will influence those who control power and the means of coercion. Then, they will have succeeded!

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<sup>217</sup> The entry into force of the new ICC led the U.S. to stop supporting U.N. peacekeeping operations unless the ICC gives Americans taking part in peacekeeping immunity from prosecution. The dispute over immunity could have serious implications for the U.N. peacekeeping mission in Bosnia; the U.S. has said it could withdraw the force it has in Bosnia if demands for immunity are not met. The political debate ended on July 12, 2002 with a “golden-mean” solution: The U.S. peacekeepers are given immunity from the ICC for a year. That will allow the peacekeeping operations to continue, to ease the American fears, and the ICC to maintain its integrity. See *US troops get exemption for now*, South African Press Association [online] at: [http://www.news24.com/News24/World/0,1113,2-10\\_1213265,00.html](http://www.news24.com/News24/World/0,1113,2-10_1213265,00.html), 7/13/2002.

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## VI. FINAL OBSERVATIONS AND CONCLUDING REMARKS

### A. THE TRANSNATIONAL CRIMINAL JURIDICAL INSTITUTIONS IN THE TWENTY-FIRST CENTURY

#### 1. Beyond the *Ad Hoc* Tribunals

The international civil society has made significant progress after the end of the Second World War. The two IMTs served as symbols, appealing to the hearts and minds of the people worldwide. They have developed new legal norms and standards of behavior. Responsibility and accountability have been advanced under international law. The legal bases and reasoning for social and political institutions, state and military conduct have been improved. However, it would be unrealistic to think that the tragedies brought by wars and human rights abuses would disappear with these military tribunals and their codifications.

It is no exaggeration to argue that their normative developments did not go very far due to the Cold War tensions. While international human rights law and international criminal law developed quickly, their international monitoring and enforcing mechanisms remained highly political or quasi-judicial in the best of the cases. For most of the Cold War era, human values and international law were virtually taboo during the Cold War, since they were seen as an ideological bent of the West.<sup>218</sup> De-colonization strengthened even more respect for state sovereignty during the early Cold War. The Third World countries decried interference in any forms in their domestic affairs. Moreover, the West and the Soviets treated relations of democracy as an illegitimate intrusion into domestic state affairs.

In this international setting where balance due to mutual destruction provided stability, norms and values were secondary issues. Interference in foreign nations was done only with respect to “containment policies” and in similar efforts to win the Cold War. It was definitely a world of states in a system of anarchy, dominated by realism. Under that perspective, the West used its influence in creating human rights judicial bodies like the ECHR, and the IACHR with strong monitoring powers but limited

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<sup>218</sup> The human rights norms established at Helsinki Final Act, signed in 1975, undermined the viability of one party Communist rule hence, contributing significantly to the large changes of 1989 and the victory of then West. For more see Daniel C. Tomas, *The Helsinki Effect: International Norms, Human Rights, and the Demise of Communism*, Princeton University Press, 2001.

enforcing capability, either for reasons of regional unity or to provide ideological legitimacy against the Soviets. The ECHR system in particular was necessary, despite the prior existence of the U.N. system, because it meant to be effective since all its members shared an essentially democratic political culture.

During the Cold War period, legal arrangements, as they have already been briefly addressed in the second chapter, followed the political tensions. States were “salient” and their consent was needed for any other state to take legal action in vindication of a public interest. Furthermore, it was the state that was wrong; the individual was not responsible for international wrongs or for conduct in breach of international obligations. It is the state that acts in the international plane. Since the Second World War, only two international conventions referred to an international criminal jurisdiction, namely Article 6 of the 1948 Genocide Convention, and Article 5 of the 1973 Apartheid Convention. The former only referred to an eventual criminal court, and the latter to establish an international criminal jurisdiction to prosecute apartheid, which obviously was not enforced for political reasons. Hence, political considerations, the notion of state, and the state’s consent prevented the use of international legal standing against international crimes such as the ones that Nuremberg and Tokyo faced.

Along the same lines came the civil-military relations. In the Cold War climate the armed forces of the Soviet block were under the complete control of the communist political apparatus. The Western powers with the United States as their leader were more concerned with the strategic balance than with “pulling straggling western allies to the democratic flock.”<sup>219</sup> Democracy in West Germany and Japan was promoted in order to consolidate the West’s side in the post world-war world following the early Cold War containment doctrine. The issue of getting the military under the democratic civilian control was performed in a similar manner; only where it was necessary or convenient for the sake of the common effort of the West. In this bipolar world between the East and the West, international factors and especially international law and international juridical bodies have played a role secondary to the transitions to democracy. In South America, international pressures were more ambiguous due to the role and the influence of the U.S. in the region. However, they have influenced the views of the elites domestically, and

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<sup>219</sup> Felipe Agüero, *Soldiers Civilians and Democracy*, Johns Hopkins University Press, 1995, p.4.

“have indeed been critical in several instances in triggering or encouraging the transition and in supporting processes of democratic consolidation later on.”<sup>220</sup>

When the Cold War was over, the Soviets and the Americans trying to avoid a security vacuum, considered the United Nations as their prime candidate to help organize international peace and security. The United Nations provided a ready answer for the World Powers to dissolve conflicts in places that had relatively little significance to them. In these conflicts the humanitarian consequences were such that the public opinion in the West, in the new emerging globalization era, could not ignore them. Issues like dismantling militaries, and bringing them under civilian control, promoting democracy and the free market, and building institutions for peace and prosperity became the favorite debates in both sides of the Atlantic. In that attempt the United Nations’ role in global politics was re-oriented: its Security Council now personified the central norms and values of the international community, and proved to be the major instrument for promoting and establishing them worldwide.

However, these values despite their moral significance were mainly defined in terms that furthered security and sovereignty among the states, and the United Nations became the missionary for that effort. The main issue now is to create regions with shared values, and within them states that have domestic legitimacy and the rule of law. Furthermore, due to the belief that the domestic rule of law promotes the international rule of law, democracy was accepted as the cornerstone to international security. A state was seen now not only as source of protection but also as source of harm causing instability, and that most of the security crises occurred not between states but within them. “The only way to fix that problem was to promote the rule of law, a point made in countless speeches and documents.”<sup>221</sup> Hence, after several decades of slow progress, the breakthrough came in 1993 and 1994 respectively with the establishment of the two United Nations *ad hoc* tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These tribunals showed that the unwillingness or inability of the national authorities to bring to justice the perpetrators of horrific crimes could be overcome. Justice and security can be achieved if the international community is willing to support such bodies

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<sup>220</sup> Ibid, p.33.

<sup>221</sup> Michael Barnett, *Eyewitness to a Genocide*, p.27.

politically, economically and by providing the enforcement capacity necessary. Indeed, regardless of how their jurisprudence and rules of procedure are viewed, their value as precedents sending a powerful message cannot be contested. Both of the tribunals are now entering their phase of maturity and they do not seem to be holding back on attempts at bringing to justice those believed responsible for the horrific atrocities. They serve as part of the tool kit for building confidence and reconciliation in their post-conflict societies and prevent destabilization of their regions, and show that the cooperation of the neighboring states is a reality. Efforts by the international community and the West in supporting the ICTY and the ICTR should be seen as a long-term commitment.

Moreover, with these tribunals, an interesting “spill over” effect was obtained in terms of an increased concern for the punishment of notorious human rights offenders that committed atrocities as parts of the higher echelons of their military or as head of states. The decision by British courts in 1998 that Senator Augusto Pinochet could be extradited to Spain to face trial for crimes against humanity allegedly committed while he was head of State of Chile was of tremendous importance in fighting the notion of impunity. Similar decisions were made during 2000 by a Senegalese court against the former Chadian President Hissene Habre on torture charges, and in 2001 with the convictions of four Rwandan defendants by a Belgian jury for complicity in the 1994 genocide.<sup>222</sup>

Recently new approaches in international justice have emerged, as products of the consensus between a sovereign state and the United Nations, the latter providing the drafting, adoption, implementation, administration and funding of the necessary legislation (such is the case of East Timor) or just providing materiel and international personnel (such is the case of Cambodia). These juridical bodies fall under the definition of the Transnational Juridical Institutions but are beyond the scope of this thesis. Nevertheless they will be briefly addressed. Their major characteristic is that although they embrace local communities, and their important by-product is expected to be institution building, they suffer from major problems of implementation. Their mechanisms are grafted onto weak national justice systems, by no means close to international or Western standards, most of the times not compatible with local

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<sup>222</sup> Jelena Pejic, *Accountability for international crimes: From conjecture to reality*, IRRC March

expectations, and the logistic support and commitment needed for them seem to have strained the capabilities of the international community.<sup>223</sup>

The first of these bodies in Cambodia has recently failed since the United Nations announced on February 8, 2002 that it was ending negotiations with the government of Cambodia to establish the tribunal.<sup>224</sup> It would have examined crimes committed twenty-five years ago in Cambodia, the “Khmer Rouge tribunal” as it is called. It had been the object of lengthy and complicated negotiations by Cambodia and the United Nations, and it would have been composed of both national and international judges and prosecutors, organized in three Trial Chambers under the national system. Its jurisdiction would have been over serious violations of Cambodian and international law between 1975 and 1979, committed by senior leaders and others. Due to the corruption and the low standards of the domestic system the United Nations ended negotiations with Cambodia to set up the tribunal.

The second internationalized tribunal addresses crimes in Sierra Leone. On August 2000, the government of Sierra Leone initiated moves by the Security Council establishing such a court, and the United Nations responded with a treaty based court of concurrent jurisdiction with national courts, and mixed composition (its judges will be both national and international but the Prosecutor will be appointed by the Secretary General) for crimes in the territory of Sierra Leone since November 1996. This court is financed by the United Nations under an agreement between the latter and the government of Sierra Leone in January 2002.

The last internationalized body is the tribunal established by the United Nations Transitional Administration in East Timor (UNTAET), for persons that have committed genocide, crimes against humanity, war crimes, torture and specific violations of the Indonesian Penal Code in the region in 1999. It is composed of Special Panels serving as part of the District Court of Dili and the judges are both from East Timor and of other

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2002, Vol. 84, No 845, p. 13-33.

<sup>223</sup> Remarks on these bodies have mainly derived from the following articles:

Jelena Pejic, *Accountability for international crimes: From conjecture to reality*, p. 13-33, and

Suzannah Linton, *New approaches to international justice in Cambodia and East Timor*, IRRC March 2002, Vol. 84, No 845, p. 93-119.

<sup>224</sup> Statement by UN legal Counsel Hans Corell at a press briefing in New York, February 8, 2002. Available [online] at: <http://www.un.org/News/dh/infocus/Cambodia/corell-brief.htm>, 6/25/2002.



nationalities. While it has been trying individuals since 2001 and its first ruling came on December 2001 it has been criticized for its link to a very weak national justice system and lack of funding.

After all these tribunals-especially after the ICTY and the ICTR- due to the time and effort required to establish, make them functional, and to provide the necessary logistics, the Security Council reached a point of “tribunal fatigue.” Moreover, even if they have not produced a sufficient record on which to be judged, these tribunals’ establishment is under the Security Council’s authority. Once peace and security is restored, the latter loses its competence and the tribunals come to a close unless the Security Council itself finds that they are still necessary for maintaining peace, security, and stability. However, it is obvious that this should not be the practice against impunity. The idea of a permanent international court free from political manipulations is not new, but instead is overdue. This Transnational Juridical Body truly international is opted for the new world order, which includes the elimination of impunity.

## **2. The International Criminal Court (ICC) Regime**

The ICC regime attempts to balance the role of national and international institutions. The ICC as a legal institution is highly sophisticated and no summary can provide an adequate understanding of the court *per se* and the political debate behind it, as a thorough and careful study of its Statute and the relevant history behind it. However, a broad outline for the sake of completion could bring some light to the principles and the current debate over it.

Historically, the idea of the establishment of a permanent ICC goes back to the post Second World War period. Shortly after the U.N. was founded, the International Law Commission (ILC) was mandated to codify the principles that emerged from the IMTs, but further progress was hampered due to the Cold War. In 1989, after an initiative from Trinidad and Tobago over the problem of drug trafficking it was brought to the surface again. In the new globalization era, the set up of the ICC quickly progressed.<sup>225</sup>

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<sup>225</sup> For the initial U.S. resistance towards the ICC concept, the effect of the ICJ’s decision on the *Nicaragua* case in U.S. policy, and the mistrust of international tribunals see Michael P. Scharf, *The politics behind the U.S. opposition to the International Criminal Court*, New England International and Comparative Law Annual.

Available [online] at: <http://www.nesl.edu/annual/vol5/scharf.htm>, 6/29/2002.

After the events in the former Yugoslavia, and in Rwanda the idea of prosecuting individuals among the military, high ranking officials and even heads of state acquired a broad based support among the public and many states. The U.N. General Assembly established in 1994 an *ad hoc* committee to review a draft Statute provided by the ILC, and to consider arrangements for the convening of an international conference on the plenipotentiaries. At the same time, as has been shown from the analysis in the previous chapter the experience with the two *ad hoc* tribunals was mixed. Hence, the ICC looked like a very promising solution for the future; both desirable and practical. Years of efforts of multinational working groups culminated in the convening of the Rome Conference. The conference was attended by one hundred and sixty states, from June 15 to July 17 1998 that adopted the ICC Statute on the last day.

It is important for the analysis to notice that a significant driving force behind the ICC's momentum were a group of delegations known as the "like-minded" states,<sup>226</sup> and non-governmental organizations, especially the "NGO Coalition for an ICC." Their lobbying at the United Nations contributed to keeping the momentum for the ICC alive. On the other hand the greatest challenge to the ICC came from members of the Security Council,<sup>227</sup> notably the U.S. and China. Against the adoption of the ICC also voted India, Libya, Iraq, and Yemen. Russia has signed the Treaty but not ratified it yet. The United States and China, each for different reasons, wanted to put the ICC under the control of the Security Council by making the latter the deciding body of the cases that will be viewed by the ICC. China is much concerned with the human rights situation domestically; abuses against its own population may bring China to the stand.

China could not accept the universal jurisdiction of the ICC without State consent. In its view, the power of the Prosecutor should be based on State consent. Moreover, the ICC Statute should be adopted by consensus.

India was concerned that the Statute gives to the UN Security Council a role in terms that violate international law-the Council has the power to refer a case to the ICC, the power to block the ICC's proceedings, and the power to bind non-States Parties to the ICC Statute-all these while some of the security Council members may have no intention to become States Parties to the Statute. Secondly, India was also concerned that the Statute accepts the concept of universal or inherent jurisdiction, making no distinction

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<sup>226</sup> By April 1998 the group included Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad, Tobago, Uruguay, and Venezuela.

<sup>227</sup> By June 27, 2002 China, India, Pakistan, Indonesia, Iraq, and Turkey have failed to sign up to the 1998 Rome Treaty. The U.S., Egypt, Iran, Israel, and Russia have failed to ratify the Treaty.

between States Parties and non-States Parties. Finally, the ICC Statute has failed to incorporate India's proposal to proscribe as a war crime the use of 'weapons of mass destruction, i.e. nuclear, chemical, and biological weapons.'<sup>228</sup>

The American concerns arise from a fear that military personnel and state officials will be subjected by disgruntled states to prosecution by the court. Under the Clinton administration, the U.S. envoy to the Rome Conference supported a court of more limited powers. Eventually the U.S. signed the Treaty but due to the strong Republican control of the Senate no attempt to ratify it was made. The new U.S. administration has made it clear that has no intention to ratify the ICC. In early December 2001, the U.S. Senate first adopted a version of the controversial bill known as the American Servicemembers' Protection Act (ASPA), and a few days after Christmas 2001 the U.S. Congress came very close to passing a law that would have permanently banned U.S. participation in the ICC.<sup>229</sup> As Mark Grossman, Under Secretary for Political Affairs remarked,

We believe the ICC undermines the role of the United Nations Security Council in maintaining international peace and security.

We believe in checks and balances. The Rome Statute creates a prosecutorial system that is an unchecked power.

We believe that in order to be bound by a treaty, a state must be party to that treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. The ICC asserts jurisdiction over citizens of states that have not ratified the treaty. This threatens US sovereignty.

We believe that the ICC is built on a flawed foundation. These flaws leave it open for exploitation and politically motivated prosecutions.<sup>230</sup>

Hence, on May 6, 2002 the U.S. informed the U.N. that their intention is not to become a part of the court although the previous administration signed the ICC treaty in 2000. Moreover, on February 28, 2002 the U.S. announced that it wants to end the U.N.'s system of the international war crimes tribunals by the year 2007-8. In the American opinion this system foster a dependency on international institutions.<sup>231</sup>

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<sup>228</sup> Kriangsak Kittichaisaree, *International Criminal Law*, p. 36.

<sup>229</sup> Jonathan Tepperman, *American Opposition to the International Criminal Court*, Crimes of War Project, March 6, 2002.

Available [online] at: <http://www.crimesofwar.org/onnews/news-Tepperman.html>, 6/27/2002.

<sup>230</sup> *American Policy and the International Criminal Court*, U.S. Department of State, May 6, 2002.

Available [online] at: [www.state.gov/p/9949.htm](http://www.state.gov/p/9949.htm), 6/27/2002.

<sup>231</sup> Stacy Sullivan, *United States Calls for Dissolution of UN War Crimes Tribunals*, Crimes of War Project, March 6, 2002. Available [online] at: <http://www.crimesofwar.org/onnews/news-dissolution.html>, 6/27/2002.

Domestic U.S. policies, the new administration's policy towards the ICC and the fear of putting U.S. personnel at risk of politicized prosecutions, especially after the horrific terrorist attack on September 11, 2001 reinforced the decisions not to participate or assist the ICC. However,

The question is not whether the risk of unfounded prosecution of American soldiers should be minimized. It should be and it has. The question is whether the benefit of eliminating the very last iota of risk justifies totally ignoring the cost to other interests of opposing the ICC. No rational calculation could conclude that it does.<sup>232</sup>

In some cases, American servicemembers and policy makers were accused for war crimes, along with the rest of their NATO allies, for the NATO air campaign over the former Yugoslavia in 1999. Therefore, a committee was set by the ICTY Prosecutor in May 1999 to assess the allegations. The latter's final report of June 2000 "exonerated all NATO personnel from all blame by deferring to the honest judgment of the soldiers in the field and the military strategists at the relevant time."<sup>233</sup>

Unfortunately, the U.S. decisions towards the ICC broke ranks with its closest allies. It is not only that the Americans were considered to be the leaders among the west in prosecuting war criminals and promoting the rule of law for decades, and this seems not to be the case any more, but in terms of policy they isolate themselves from their closest ally, the E.U..<sup>234</sup>

Regardless of how the U.S. and China view the ICC, for a large number of states is considered to be a landmark in international cooperation and possibly the greatest step towards transnational justice. Up to November 1, 2002 one hundred and thirty-nine states are signatories to the 1998 Rome Treaty, and eighty-one of them, including all the members of the European Union, are already parties to the treaty. Since the ICC needed only sixty signatories for entry into force, the ICC will begin functioning on July 1, 2002. This led the U.S. to stop supporting U.N. peacekeeping operations unless Americans taking part are given immunity from prosecution by the ICC. The dispute over immunity

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<sup>232</sup> *International Criminal Court: The Case for U.S. Support*, LCHR, p. 2. Available [online] at: <http://www.lchr.org/feature/50th/uspos.htm>, 6/27/2002.

<sup>233</sup> Kriangsak Kittichaisaree, *International Criminal Law*, p. 163. The Final Report is available [online] at: <http://www.un.org/icty/pressreal/nato061300.htm>, 6/27/2002.

<sup>234</sup> Although on September 30, 2002 the E.U.'s fifteen foreign ministers set forth guidelines that would allow individual E.U. states to negotiate with the U.S. limited immunity arrangements, Washington still strongly opposes the ICC. See *US rejects EU criminal court guidelines*, BBC, UK. Available [online] at: <http://news.bbc.co.uk/1/hi/world/europe/2291451.stm>, 11/1/2002.

could have had serious implications for the U.N. peacekeeping mission in Bosnia; the US had said it could withdraw the force it has in Bosnia if demands for immunity are not met.<sup>235</sup> Similar attempts for East Timor had been made on May 2002, “after several council members, including Washington's closest allies, rejected a U.S. proposal to extend criminal immunity to all former or current U.N. personnel serving in the mission.”<sup>236</sup> Finally, on July 12, 2002 the U.N.S.C. agreed unanimously in providing the U.S. peacekeepers with a twelve-month exemption from the ICC,<sup>237</sup> and the problem is therefore solved for a year. However, if an exemption renewal does not follow, the Stability Operations as part of the missions of the U.S. military will have to refocus in non-U.N. operations, which will hinder the traditional U.S.-U.N. cooperation.

It is important to notice that a multinational treaty establishes the ICC. The court is designed to attract the support of its State Parties, i.e., a political support without sacrificing the fairness and effectiveness of the ICC as an institution, through a combination of features displayed in its Statute. Although there were many compromises for reaching the final draft, mainly to satisfy the United States, “there eventually was a limit to how much they would debilitate the Court in order to satisfy a nation that plainly was not going to join.”<sup>238</sup> For that a closer look to the ICC’s Statute seems necessary.

The ICC Statute comprises a Preamble and thirteen parts of total of one hundred and twenty eight articles. It is already part of the customary international law since the vast majority of the states have adhered to it. The Statute’s Preamble states that only the most serious crimes of concern to the international community will be brought to the court, and emphasizing that the ICC will have complementary jurisdiction to the national courts.

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<sup>235</sup> *UN urged to oppose US immunity*, BBC NEWS, June 27, 2002. Available [online] at: [http://news.bbc.co.uk/1/hi/english/world/americas/newsid\\_2069000/2069059.stm](http://news.bbc.co.uk/1/hi/english/world/americas/newsid_2069000/2069059.stm), 6/27/2002.

<sup>236</sup> Colum Lynch, *U.S. Peacekeepers May Leave East Timor-Immunity Sought By World Crimes Court*, Special to the Washington Post, May 18, 2002, p. A20. Available [online] at: <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A36036-2002May17&notFound=true>, 6/27/2002.

<sup>237</sup> U.N. agrees to U.S. peacekeeper exemption, CNN.com./U.S. Available [online] at: <http://www.cnn.com/2002/US/07/12/us.international.court/> 7/20/2002.

<sup>238</sup> *International Criminal Court: The Case for U.S. Support*, LCHR, p. 12.

Part 1 is entitled “Establishment of the Court” affirms the independence of the ICC as a permanent institution, with the seat at The Hague, Netherlands. The court will have international legal personality and such legal capacity necessary to fulfill its purposes. It may exercise its powers on the territory of any state Party to the Rome Convention and on the territory of any other state by special agreement.

Part 2 is under the title “Jurisdiction, Admissibility and Applicable law.” This is a highly politically influenced part, and is a result of a compromise in which the scheme established will assure effectiveness while respecting the sovereignty of the states. It mainly states that the ICC shall have jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression once the latter is defined. Therefore, its subject-matter jurisdiction is very narrow. Likewise, its jurisdiction *ratione temporis* exists only for conduct occurring after the Statute’s entry to force. The ICC will have jurisdiction only if either the state of nationality of the accused or the state on the territory of which the crime took place, is party to the Statute. If they are not parties then the ICC will exercise jurisdiction only if either of the states consents so or, if the UN Security Council sends the case to the ICC. Hence, by requiring state consensus, the ICC upholds the basic idea of differentiation between the individual who engages in criminal acts from the collectivity, which the individual claims to represent. In addition to these limits, the principle of complementarity displays the respect to the national systems. The primary responsibility for investigating and prosecuting crimes are in the hands of the domestic systems. The ICC will act in cases where the latter are unwilling or unable to do so themselves. Therefore, if U.S. servicemen were accused the ICC’s jurisdiction would be triggered only if the United States of America were unwilling or unable to prosecute. However, even preliminary U.S. investigations of wrongdoing would satisfy this requirement; even if no charges were finally brought. Furthermore, the US has a rigorously enforced military system hence; it is extremely unlikely that the ICC *would ever have the chance* to bring charges against U.S. military personnel. Even in the case of the My Lai massacre it does not seem likely that the ICC would have jurisdiction since the U.S. prosecuted the individual, under U.S. national law,<sup>239</sup> responsible for the

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<sup>239</sup> According to Dr. J. Holmes Armstead Jr. “The My Lai incident, besides being the horrible crime that it was, was a reflection on this country and our fighting forces. It was a reflection on the way we view ourselves in the international community and a vivid demonstration of how wrong we can be. It afforded an

massacre.<sup>240</sup> The ICC is not a replacement of the national justice systems; in fact the ICC's contribution to the weaker national legal systems is likely to be one of the most important long-term accomplishments.

Part 3 is under the title "General Principles of Criminal Law." It incorporates the basic principles of legality *nullum crimen, nulla poena sine lege*. Moreover, the ICC shall have jurisdiction only over natural persons and from those only the ones over the age of eighteen. Official positions neither bar its jurisdiction nor they constitute grounds for reduction of sentence. Additionally, this part provides for the responsibility of commanders and other superiors in addition to the rest criminal responsibility provisions, and states that the crimes within the ICC's jurisdiction shall not be subject to any statute of limitations.

Part 4 addresses the compositions and administration of the ICC. The court will include the Presidency, namely the President and two Vice Presidents; the Appeals Division, a Trial Division, and a Pre-Trial Division; the Office of the Prosecutor; and the Registry. A total of eighteen judges will serve the court,<sup>241</sup> and most importantly the Office of the Prosecutor, who is elected by an absolute majority of the Assembly of States Parties for two years, shall act as a separate organ, independently.

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opportunity however, to deal with issues of international war crimes as regarding our own citizens and while justice was meted out to one irrefutably culpable, a trial by a different forum with more latitude would have provided a more comprehensive resolution of the legal issues involved. We treated an uncommon criminal as if he had committed a common crime and receive a not unexpected result-a guilty verdict. But that is not enough; this man was found guilty of the wrong charge and probably in the wrong court." J. Holmes Armstead Jr., *The United States vs. William Calley: An opportunity missed!* Southern University Law Review, Vol. 10, No. 2, Spring 1984, p.217.

<sup>240</sup> William Calley was tried by a court martial for his role in the My Lai massacre in Vietnam during the Vietnam War, was convicted and sentenced to life imprisonment and hard labor. Nevertheless, the US President Richard Nixon ordered that he be confined to quarters pending appeal, and the Commander of the Third Army reduced Calley's sentence to twenty years. IN 1974 the US Secretary of Defense reduced his sentence to ten years, and in 1975 he was released on parole until the US Court of Appeal for the Fifth Circuit reversed the decision of the district court; Calley remained free on parole, and released after serving a total of six months of his sentence. In My Lai twenty-two infants, children, women, and old men were killed in cold blood. Kriangsak Kittichaisaree, *International Criminal Law*, p. 41. Furthermore, it is important to notice that the crimes in the ICC treaty are crimes of universal jurisdiction hence, any nation in the world has the authority to exercise jurisdiction over such criminals without the consent of the individual's nationality. In that case the ICC provisions are definitely, again, in favor of a hypothetical U.S. servicemember.

<sup>241</sup> For how the judges are nominated and elected at the ICC see Neil Falzon et. all, *Nomination and Election of Judges to International Courts*, The European Law Student's Association, April 2002. Available [online] at:

<http://www.iccnw.org/ELSAprepcor9annex.pdf>, 6/27/2002.

Part 5 involves the procedures for investigation and prosecution. It should be noted that the Prosecutor could carry out investigations within the territory of a State Party without needing the cooperation of that state if the Pre-Trial Chamber determines that that state is unable to execute a request for cooperation. The Prosecutor is independent however “detailed provisions are included in the Statute to ensure proper checks and balances with respects to his power.”<sup>242</sup> He must defer to states, the investigation is initialized not from him but from the Pre-Trial Chamber, both the suspect and the states concerned have the right to challenge his decisions, the admissibility of the case and the jurisdiction of the ICC can be also challenged under the Statute. The Prosecutor’s appointment is done by secret ballot by the State Parties and the Assembly has the power to remove him.

Part 6 addresses the trial, and the rights of the accused, where Part 7 enumerates the penalties imposed, and Part 8 provides on Appeal and Revision. Part 6 states that there will be no trials *in absentia*. It is very important that, according to this part, the ICC is empowered to award reparations to victims. This reparation can be restitution, compensation, and rehabilitation. In terms of punishment the ICC may impose only imprisonment, and forfeiture of proceeds, property, and assets derived from the crime. In general the Statute contains the most comprehensive list of due process protections, which has so far been promulgated, and sets extensive checks and balances to prevent prosecutorial abuses.

Part 9 regards International Cooperation and Judicial Assistance and Part 10 Enforcement. Non-State Parties may be invited also to provide assistance. ICC has priority over competing requests between itself and other states. When a State Party fails to cooperate with the ICC, the latter may refer the matter to the Assembly of the States Parties or to the U.N. Security Council if the latter referred the matter to the ICC. Moreover, the ICC may not proceed with a request for surrender, which would require the requested State to act inconsistently with its obligations under international law or international agreements. Such obligations and agreements as diplomatic immunity of an individual or property of a third State are agreements according to which the consent of the third state is required. This was again an issue of political compromise since states are

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<sup>242</sup> *Some Questions and Answers, Rome Statute of the International Criminal Court*, United Nations,



reluctant to surrender their citizens to international judicial bodies. The relevant national law or constitution in many cases prohibits extradition. The United States of America mainly upheld the debate over the issue, and the solutions adopted represent some of the U.S. concerns. The latter is concerned that U.S. citizens could be brought to the ICC without any U.S. consensus. At present, the United States of America has Status-of-forces agreements (SOFA) with the host state in which U.S. forces are stationed that protect U.S. personnel from local arrests for actions in course of their duties; the concerns remains for states that no SOFA exists. However, “the United States has promoted and become a party to several treaties that create new international crimes over which national courts have jurisdiction (for instance, money laundering and drug trafficking), even if the accused is a citizen of a country that is not a party to the treaty, and even if the crimes were not committed in the country that proposes to try them.”<sup>243</sup>

Parts 11, 12 and 13 regard the Assembly of Party States, Financing, and final Clauses respectively. Each State Party will have one representative to the Assembly and they will represent the voting body of the ICC, deciding on relevant non judicial issues, e.g. administration, budget approvals, number of judges etc. The ICC is to be financed by contributions from the State Parties based on the U.N. scale; by the U.N., subject to the approval of the U.N. General Assembly; and on voluntary contributions. In the Final Clauses part is provided that the ICC will settle disputes regarding judicial functions; the rest are responsibilities of the Assembly or can be regulated by negotiations. The Statute can be amended but only after seven years from its entry to force, i.e., in 2009.

The ICC started operating in July 1, 2002. It will be harder for the court to function without the logistic capacity, military know-how, finding and providing evidence, and the political support of the U.S.. Nevertheless, due to its importance, the Americans are likely at some point in the future to become a Party State. The ICC in the short term is not going to do very much. The case of U.S. personnel to be brought to the court exists in theory but it is not likely to happen; the arguments have more to do with

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p.5-6. Available [online] at: <http://www.un.org/law/icc/statute/iccq&a.htm>, 6/27/2002.

<sup>243</sup> Marc Grossman Under Secretary of State for Political Affairs. Cited from Antony Dworkin, *The United States and the International Criminal Court: A briefing*, Crimes of War Project, May 15, 2002, p.8. Available [online] at: <http://www.crimesofwar.org/onnews/news-us-icc.html>, 6/27/2002. Similarly in anti terrorism treaties. See *United States v. Yunis* and *United States v. Ali Rezaq* cases where a Lebanese and a Palestinian national respectively were apprehended and prosecuted for hijacking, with the U.S. claiming universal jurisdiction.

domestic U.S. politics than reality. Likewise, the U.S. criminal, and military justice system would have in any case primacy over the ICC. There are many NATO and European allies that share the same concerns, but they are overwhelmingly supporting the ICC. Besides the issues of credibility, it is important to adhere to the principle that international law is not just for the others; international law is for everyone, is universal. In the state-policy arena, sooner or latter cases like Rwanda or Yugoslavia will unfortunately happen again, and the U.S. will have no influence over the way things will be happening; an unwelcome perspective for the only superpower left after the end of the Cold War.

From a purely pragmatic standpoint, the United States can do more to advance national interests (and the interests of U.S. servicemembers) by signing the Treaty than it could by continuing to-oppose the ICC. To no small degree, the Court's efficacy and impact will hinge on the appointment of capable, fair, and apolitical officials. The United States has everything to gain from helping to choose those individuals. The United States will be in a better position to ensure an appropriate U.N Security Council role regarding the definition of aggression if ever the Assembly of States Parties were to entertain discussions on that contentious issue. Ignoring the court accomplishes little. It seems, on balance, prudent to sign the treaty.<sup>244</sup>

The current political debate seems to favor a “golden-mean” solution: The U.S. peacekeepers have already been given immunity from the ICC for a year, then most probably this immunity will be extended on a year-by-year basis, and the E.U. has allowed the European states to negotiate limited immunity deals with the U.S.. This situation will permit the peacekeeping operations to continue, to ease the American fears and help them in moving towards the actual provisions of the 1998 Rome Treaty, and the ICC to maintain its integrity.

## **B. SUMMARY AND CONCLUSIONS**

This thesis examined the practice and theory of the four *ad hoc* criminal tribunals, namely the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East at Tokyo, the International Criminal Tribunal for Yugoslavia at

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<sup>244</sup> William L. Nash, *The ICC and the Deployment of U.S. Armed Forces*, American Academy of Arts and Sciences. Available [online] at: <http://www.amacad.org/publications/icc9.htm>, 6/29/2002.

The Hague, and the International Criminal Tribunal for Rwanda at Arusha. This was done through the scope of civil-military relations and their dynamics.

It proved to be a topic generally neglected by both political scientists and international lawyers. The political scientists have not so far focused in international courts as external systemic factors and the international lawyers were more involved with the jurisprudence of the courts than the social and political outcomes.

The basic research done proved to be constructive despite the difficulties encountered. These tribunals have shown that international repression of serious violations of international crimes is no longer a theoretical concept, and that is what is expected from them: to send the signal that impunity is no longer tolerable. In doing so, they significantly challenged the relations between the military, the state, and the society not just in the state that had or have jurisdiction but worldwide.

The International Military Tribunals produced principles that were codified as international law and influenced societies by serving as symbols; states and state behavior through their constitution, legislation, and appealing to the public; armed forces through education, changing traditions, training in new missions, and forging a cult of obedience in international law. Although Germany and Japan had been for many years under occupation, credit has to be given to the IMTs for the establishment of democratic civil-military relations in them. The German Basic Law created democratic citizen-soldiers that are mirror images of their societies since “democracy can be defended only by democrats.” The German soldier this time is not a simple state organ but a political being that by law is required to defend its Constitution hence to accept and preserve political control and respect for human rights. Horrific crimes like genocide and aggressive wars are explicitly prohibited. In Japan the 1946 “pacifist” Constitution effectively not only limits the capabilities, the roles and the missions of the military; it bans war itself. In both countries monitoring bodies were established under the Constitution to assure both that the conduct of the armed forces is along with the lines of the Constitution and that the state is not misguiding the armed forces in missions for holding on to power. These Constitutions were embraced by the respective societies which after suffered during the Second World War the remained under occupation for many years, hence bringing again

issues regarding the military into balance and not mere condemn. Even more the West and mainly the society in the United States of America embraced the tribunals; Nuremberg serves to them as symbol of justice and not just might. Missions of their own military were either condemned or applauded under the perspective of justice given more than fifty years ago, e.g. the wars in Vietnam and the Persian Gulf respectively.

The Cold War significantly slowed down their normative developments at the international level. Certainly it was not, and it is not anticipated that the rulings of the International Military Tribunals would or will put an end to aggressive wars or war crimes. It is doubtful whether an explicit definition of aggression satisfying the principle of legality could ever be agreed upon. However, their significance in shaping public opinion and policy-makers world wide, in declaring an international ban on waging such acts was, and still is, of outmost importance. Their jurisprudence was used from the national legislations against war criminals and human rights abusers. Furthermore, the influence of their principles on the United Nations is obvious besides the U.N. *per se*, to the plethora of international treaties signed, e.g., the Geneva Conventions, the Genocide Convention, the Apartheid Convention, etc. Likewise regional structures were created like the ECHR and the IACHR to monitor the respect to human rights. When these Conventions were ratified from the national legislature then they restricted and guided the military even more.

Furthermore, even though the IMTs had taken place more than fifty years ago they still influence policies and affect the armed forces. The way the latter are trained, educated, design their missions, and deployed is another indicator of their influence. New missions in terms of stability operations require knowledge of terms like “aggression,” “proportional force,” “war crimes,” “genocide,” and “crimes against humanity” as the recent experience has shown. This terminology was first established in those criminal tribunals after the Second World War. Because the military are trained the way they are going to fight they are growingly exposed to all these terms and norms behind the latter.

Likewise, a new doctrine in the post Cold War era has been introduced, that includes political stability, economic development, democratic governing, ethnic harmony, and respect for human rights. In countries such as the former Yugoslavia and Rwanda that during the last decade even human dignity has been trampled on a large scale. By

punishing those responsible for the horrific crimes in those states a powerful message to the political, military authorities and warlords is delivered worldwide: one day sooner or later they will be brought to justice. This is exactly what the ICTY and the ICTR are trying to do.

Their mandate is not to develop international law; those standards already exist. Their broader mandate is to reaffirm that international human rights law exists, that international criminal law exists, and gradually develop them in some cases, thus continue the momentum of the IMTs. Their jurisprudence has caused significant legal developments even diffusion effects in national legislations and in the United Nations as the cases of Pinocet and the internationalized tribunals are showing. However, their mandate should be considered also in a narrower terms, i.e. in being a part of the tool kit for building confidence and reconciliation in their post-conflict societies and prevent destabilization of their regions. Both tribunals showed as long as they are supported in their efforts they are successful. Likewise, the ad hoc tribunals' contribution within the civil-military relations should be examined under that prism. So far even being supported by the West changes started emerging only recently, and is the future that prove them real or just cosmetic; a hypocrisy by the elites holding office to provide themselves with aid, to eliminate their rivals, and to consolidated power.

The situation in the former Yugoslavia is in a flux within the society, the state, and the military, and Rwanda is fighting a war with insurgents and the DRC. Their progress has been different. In both countries new constitutions are going to be implemented during 2003. The PRF regime in Rwanda has consistently asserted its intention to convert the current highly militarized system into a democratic one with a new constitution. Further reforms included the justice system, and the passing of new legislation. The military responsible for the genocide are currently under trial at the ICTR. Efforts have been made to educate the armed forces with respect towards human rights, and reform the military justice system however; sufficient empirical results are not yet available. Nevertheless, the security threat for Rwanda is both internal from insurgents and external from DRC. Hence, even though there is a momentum towards a desirable end state it is too early to predict a conclusion.

In Yugoslavia, political and military elites shared not only the same values, but as the ICTY has shown they also shared the responsibility for the war crimes committed. This was to be expected since silent politicization has always been a reality within the army's ranks. However changes can be seen in modernizing the legal system, passing new civil-military legislation, and in cooperating with the ICTY. The recent events with the Commander in Chief show that the civilian authorities seem to be in control. Likewise the fact that the Yugoslav General did not choose to overrun the government but instead pursued his claims through the court system is a good indicator.

Furthermore, the tribunals having been exposed to criticism of partiality and "slow-justice" a fact that may cost the legitimization of the tribunals *per se* within the public in Yugoslavia and Rwanda. The committee established from the ICTY Prosecutor for alleged crimes committed by NATO against Yugoslavia during the Kosovo air campaign, was definitely towards the right side. However, the need for fulfilling their mandate in a reasonable time frame remains. Efforts by the international community and the West should be seen as a long-term commitment and support the tribunals with administrative and logistic support in order for the tribunals to fulfill their mandate as soon as possible without endangering the demand for fair trials.

The time and effort required to establish, make them functional, and to provide the necessary logistics for the above tribunals brought the Security Council to a point of "tribunal fatigue" that led to the establishment of the ICC. The debate over the latter, and the United States refusal to ratify it, has resulted in two major outcomes. The first is that efforts for prosecuting war criminals and promoting international justice lost their major contributor both in personnel and logistics the United States of America, and second that the possible U.S. military withdrawal from peacekeeping operations like the ones in East Timor and Bosnia, would effectively affect roles and missions of the U.S. military, by limiting their participation in U.N. peacekeeping.

The abovementioned research highlighted that international justice can be used as a useful policy instrument to promote democratic civil-military relations. It effects Constitutions, attitudes, education, training, roles and missions of the armed forces and poses limitations to the state and the military through the established legal order in terms

of monitoring or balancing mechanisms like the military or the criminal justice system. Hence the major argument that if justice is served through institutionally mature, resourceful, widely representative, financially viable, and autonomous Transnational Juridical Institutions, then states and individuals will commit themselves further to the rule of law, even the most powerful states, seems to be justified.

Even if the United States never ratifies the ICC, the argument will not lose its value; the executive authority of states will still have even more reason to change its *modus operandi* into one that will adequately express the will of the people, the use of the military will be restricted to lawful actions, and the armed forces will be deterred from usurping the state apparatus, as long as the rest of the international community is supportive. This is an important result if one considers that the cost of international justice is small, relative to other areas of international cooperation.<sup>245</sup> Hence, the burden for keeping international justice alive as a peculiar public good falls now within the rest of the West, especially within the E.U.. Their ability to confront the needs for keeping alive this fight against impunity and instability will be tested soon, for one thing is certain: Sooner or later there will be another Rwanda or another Yugoslavia.

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<sup>245</sup> Approximately \$250 million were spent each year up to 1996. See the conclusions in Cesare P. R. Romano, *The Cost of International Justice*.

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